10

No. 84-261-CFX
Status: GRANTED

Title: Commodity Futures Trading Commission, Petitioner
v.
Gary Weintraub, et al.

Docketed:
August 16, 1984

Court: United States Court of Appeals
for the Seventh Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Epstein,David A.

Entry	Date	Note	Proceedings and Orders
1	Jul 6 1984		Application for extension of time to file petition and order granting same until August 16, 1984 (Stevens, July 10, 1984).
2	Aug 16 1984	G	Petition for writ of certiorari filed.
4	Sep 14 1984		Order extending time to file response to petition until October 1, 1984.
5	Sep 18 1984		Brief amicus curiae of John K. Notz, Jr.,Trustee filed.
6	Oct 3 1984		Brief of respondents Gary Weintraub, et al. in opposition filed.
7	Oct 10 1984		DISTRIBUTED. October 26, 1984
8	Oct 16 1984	X	Reply brief of petitioner Commodity Futures Commn. filed.
9	Oct 29 1984		Petition GRANTED.
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10	Dec 13 1984		Brief of petitioner Commodity Futures Commn. filed.
11	Dec 13 1984		Joint appendix filed.
12	Dec 13 1984		Lodging received. To be returned to Room 5614, Department of Justice.
13	Dec 13 1984	G	Motion of John K. Notz, Jr., Trustee for the Chicago Discount Commodity Brokers, Inc. for leave to file a brief as amicus curiae filed.
14	Jan 7 1985		Motion of John K. Notz, Jr., Trustee for the Chicago Discount Commodity Brokers, Inc. for leave to file a brief as amicus curiae GRANTED.
16	Jan 15 1985		Order extending time to file brief of respondent on the merits until January 18, 1985.
17	Jan 23 1985		Record filed.
18	Jan 22 1985		Brief of respondents Gary Weintraub, et al. filed.
19	Jan 23 1985		Record filed.
20	Jan 31 1985		Record filed.
21	Jan 31 1985		Certified copy of original record on appeal received.
22	Feb 5 1985		SET FOR ARGUMENT. Tuesday, March 19, 1985. (4th case).
23	Feb 11 1985		CIRCULATED.
24	Feb 26 1985	G	Motion of the Solicitor General to permit Bruce N. Kuhlik, Esquire, to present oral argument pro hac vice filed.
25	Feb 25 1985	X	Reply brief of petitioner Commodity Futures Commn. filed.
26	Feb 25 1985		Lodging received. To be returned to the Department of Justice.
27	Mar 4 1985		Motion of the Solicitor General to permit Bruce N. Kuhlik, Esquire, to present oral argument pro hac vice GRANTED. Justice Powell OUT.
28	Mar 19 1985		ARGUED.

No. 84-261

In the Supreme Court of the United States

OCTOBER TERM, 1984

COMMODITY FUTURES TRADING COMMISSION, PETITIONER

v.

GARY WEINTRAUB, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the trustee of a corporation in bankruptcy has the power to assert or waive the debtor corporation's attorney-client privilege with respect to communications that took place before the petition in bankruptcy was filed.

PARTIES TO THE PROCEEDING

Petitioner, the Commodity Futures Trading Commission, applied to enforce an administrative subpoena in the district court and was the appellee in the court of appeals.

Respondent Gary Weintraub, a respondent in the district court, did not appeal from the district court's order.

Respondents Frank H. McGhee and Andrew McGhee intervened as respondents in the district court and were appellants in the court of appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Statutes:

Statutes—Continued: Page

Statutes—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1984

No.

COMMODITY FUTURES TRADING COMMISSION, PETITIONER

v.

GARY WEINTRAUB, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the Commodity Futures Trading Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The original opinion of the court of appeals (App., *infra*, 1a-11a) is unreported. An order of the court of appeals modifying that opinion (App., *infra*, 12a-16a) is also unreported. The opinion of the court of appeals as modified is reported at 722 F.2d 338.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1983 (App., *infra*, 23a-24a). A timely petition for rehearing was denied on April 18, 1984 (App., *infra*, 21a-22a). On July 10, 1984, Justice Stevens extended the time within which to file a petition for a writ of certiorari to August 16, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent portions of the Bankruptcy Reform Act of 1978, 11 U.S.C. 101 *et seq.*, are reprinted at App., *infra*, 25a-36a.

STATEMENT

1. This case arises out of a formal investigation by the Commodity Futures Trading Commission (CFTC) to determine whether Chicago Discount Commodity Brokers (CDCB) or persons associated with that firm violated the antifraud or other provisions of the Commodity Exchange Act (Act), 7 U.S.C. 1 *et seq.* CDCB was a discount commodity brokerage house registered with the CFTC as a futures commission merchant pursuant to 7 U.S.C. 6d(1). On October 27, 1980, the Commission filed a complaint against CDCB in the United States District Court for the Northern District of Illinois, alleging violations of the Act. The same day, the parties entered into a consent decree providing, inter alia, for a freeze on CDCB's assets and the appointment of a receiver. App., *infra*, 2a.

CDCB's sole director and officer at this time was its president, respondent Frank H. McGhee. Respondent Andrew McGhee had resigned his positions as officer and director on October 21, 1980. Larry Cote, CDCB's secretary and vice president, had resigned the following day. App., *infra*, 14a.

On November 4, 1980, the receiver, John K. Notz, Jr., filed a voluntary petition in bankruptcy on CDCB's behalf, seeking liquidation under Subchapter IV of Chapter 7 of the Bankruptcy Reform Act of 1978 (Bankruptcy Code), 11 U.S.C. 761 *et seq.* Notz was appointed interim trustee pursuant to Section 15701 of the Bankruptcy Code and was later made the permanent trustee pursuant to Section 702. App., *infra*, 2a. Upon filing of the bankruptcy petition, the CFTC commenced

its formal investigation pursuant to 7 U.S.C. 12(a) and 15.

On January 28, 1981, the Commission served an investigatory subpoena upon CDCB's former counsel, respondent Gary Weintraub, seeking his testimony regarding, inter alia, suspected fraudulent activities and misappropriation of customer funds by CDCB's officers and employees. Weintraub appeared for his deposition and responded to certain inquiries, but refused to answer 23 questions on the basis of CDCB's attorney-client privilege. App., *infra*, 2a-3a.

2. The Commission filed this subpoena enforcement action pursuant to 7 U.S.C. 15 on December 15, 1981 in the United States District Court for the Northern District of Illinois to compel Weintraub to answer the questions as to which he had asserted CDCB's privilege. After determining that waiver of the privilege would be in the best interests of CDCB's estate in light of potential claims by the estate against CDCB's former management and others,[1] the trustee in bankruptcy, on March 11, 1982, waived the corporation's attorney-client privilege with respect to any communications that occurred on or before October 27, 1980. App., *infra*, 3a. On April 26, 1982, a United States magistrate granted the Commission's application for an order compelling Weintraub to answer, on the ground that the trustee had validly waived CDCB's privilege (*id.* at 19a-20a). The district court upheld the magistrate's order on June 9, 1982 (*id.* at 18a). Frank and Andrew McGhee were granted leave to intervene on June 30, 1982 (*id.* at 3a), and argued (in a request for reconsideration) that the trustee's waiver was ineffective over their objection. On July 27, 1982, the district court

[1] See Brief of John K. Notz, Jr., Trustee, as Amicus Curiae 1. The trustee noted substantial actual or potential claims by the estate against respondents totalling more than $4 million (*id.* at 8).

clarified its earlier order to provide that Weintraub must respond without asserting CDCB's attorney-client privilege[2] (*id.* at 17a). The McGhees appealed from the July 27 order.[3]

3. The court of appeals reversed (App., *infra*, 1a-16a).[4] The Court concluded that a bankruptcy trustee does not have the power to waive a corporate debtor's attorney-client privilege with respect to communications that occurred before the filing of the bankruptcy petition (*id.* at 11a). Although it took note of the broad powers accorded a trustee under the Bankruptcy Code, the court concluded that those powers do not include the power to waive or assert the corporate debtor's attorney-client privilege for four reasons: the trustee does not under the Code "replace the corporation * * * [or] succeed to the positions of [its] officers and directors" (*id.* at 9a); waiver by the trustee of a corporate debtor would treat such debtors less favorably than individuals in bankruptcy (*id.* at 9a-10a); waiver by the trustee would discriminate against bankrupt corporations as compared to solvent corporations (*id.* at 10a); and, "most importantly," waiver by the

[2] The earlier order had not explicitly limited the attorney-client privilege in question to that asserted on behalf of the corporation (App., *infra*, 18a).

[3] Because the district court refused to compel Weintraub to testify pending appeal (App., *infra*, 4a n.4), the Commission has not yet obtained answers to the questions at issue. While administrative proceedings have already been initiated against respondents, Weintraub's answers could provide information for additional causes of action, or claims against other persons.

[4] On its own motion, the panel revised its opinion on March 19, 1984 (App., *infra*, 12a-16a), but reached the same result as it had earlier (*id.* at 1a-11a). The CFTC's petition for rehearing was denied without opinion (*id.* at 21a-22a). The petition had been supported by several amici: the Securities and Exchange Commission, the United States Trustee for the Northern District of Illinois, and the trustee for CDCB.

trustee could chill attorney-client communications (*id.* at 10a-11a).

The court of appeals recognized that its decision conflicts with *Citibank, N.A.* v. *Andros*, 666 F.2d 1192 (8th Cir. 1981), which held that the trustee of a corporation undergoing liquidation pursuant to the former Bankruptcy Act, 11 U.S.C. (1976 ed.) 110(a), could waive the debtor's attorney-client privilege, but declined to follow it (App., *infra*, 15a-16a). The court also noted that *In re O.P.M. Leasing Services, Inc.*, 670 F.2d 383 (2d Cir. 1982), held that the trustee of a corporation undergoing reorganization pursuant to Chapter 11 of the Bankruptcy Code could waive the corporation's attorney-client privilege, but distinguished it on the ground that the board of directors of the corporation there was no longer in existence, while here, Frank McGhee remained an officer and director (App., *infra*, 14a-15a).

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals conflicts with the decisions of two other circuits. It is based on a fundamental misunderstanding of the role of a trustee in bankruptcy and the power of corporate management to waive the attorney-client privilege, and will seriously impede the government's ability to investigate violations of federal regulatory and criminal statutes. Review by this Court is clearly warranted.

1.a. The decision below directly conflicts with the decision of the Eighth Circuit in *Citibank, N.A.* v. *Andros, supra*.[5] In *Citibank*, the court held that the

[5] The decision below also conflicts with a recent decision of the Ninth Circuit, *In re Boileau*, No. 83-6259 (June 27, 1984), petition for reh'g pending (filed July 13, 1984), and with the decisions of virtually every other court to have considered the question. In *Boileau*, the court held that an examiner in a reorganization proceeding who had been granted most of the powers of a trustee had the power to waive the debtor's attorney-client privilege. In reaching this conclusion, the court relied on prece-

trustee in bankruptcy of a corporation undergoing liquidation under the former Bankruptcy Act[6] may waive the debtor corporation's attorney-client privilege over the objection of its officers (666 F.2d at 1193 & n.3).

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dents such as *Citibank*, holding that a trustee has the power to waive a debtor's attorney-client privilege, and noted without comment that the decision below conflicts with these authorities (slip op. 2743). See also *Fulk* v. *Bagley*, No. C-78-333-WS (M.D.N.C. Dec. 21, 1983), reconsideration denied (Jan. 3, 1984) (Chapter X reorganization under former Bankruptcy Act); *In re Continental Mortgage Investors*, No. 76-593-S (D. Mass. July 31, 1979) (Chapter X reorganization); *In re Investment Bankers, Inc.*, 30 Bankr. 883, 886 (Bankr. D. Colo. 1983) (liquidation under Securities Investor Protection Act); *In re Nat'l Trade Corp.*, 28 Bankr. 872, 874 (Bankr. N.D. Ill. 1983) (reorganization); *In re Featherworks Corp.*, 25 Bankr. 634, 643 (Bankr. E.D.N.Y. 1982), aff'd, 36 Bankr. 460 (E.D.N.Y. 1984); *In re Smith*, 24 Bankr. 3 (Bankr. S.D. Fla. 1982); *In re Silvio De Lindegg Ocean Developments, Inc.*, 27 Bankr. 28 (Bankr. S.D. Fla. 1982) (liquidation); *In re Kaleidoscope, Inc.*, 15 Bankr. 232, 239-240 (Bankr. N.D. Ga. 1981), rev'd on other grounds, 25 Bankr. 729 (N.D. Ga. 1982) (Chapter X reorganization); *In re Amjoe, Inc.*, 11 Collier Bankr. Cas. 2d (MB) 45 (Bankr. M.D. Fla. 1976); *Weck* v. *District Court*, 161 Colo. 384, 422 P.2d 46 (1967) (statutory accountant-client privilege); S. Stone & R. Liebman, *Testimonial Privileges* § 1.19, at 35 & n.152 (1983) ("authorities are in accord that successors or trustees of bankrupt or dissolved corporations may assert or waive the privilege"). But see *Ross* v. *Popper*, 9 Bankr. 485 (S.D.N.Y. 1980) (Magis.).

[6] The debtor corporations in *Citibank* were liquidated under the former Bankruptcy Act, 11 U.S.C. (1976 ed.) 1 *et seq.* See *In re Hy-Gain Electronics Corp.*, 11 Bankr. 119, 120 (D. Neb. 1978), rev'd, *Citibank, N.A.* v. *Andros*, *supra*. Section 70(a) of the former Act, 11 U.S.C. (1976 ed.) 110(a), relied on by the court of appeals in *Citibank* (666 F.2d at 1193 n.3), does not, for purposes of the instant case, differ from Section 541(a) of the current Bankruptcy Code as it applies to liquidation under Chapter 7. See 4 *Collier on Bankruptcy* ¶ 541.02[2], at 541-14 (15th ed. 1984); *In re Silvio De Lindegg Ocean Developments, Inc.*, *supra* (following *Citibank* in Chapter 7 proceeding). Cf. *In re Investment Bankers, Inc.*, *supra* (following *Citibank* in liquidation proceeding under Securities Investor Protection Act).

The Eighth Circuit reasoned correctly that the power to assert or waive a corporation's attorney-client privilege rests with the corporation's management and that the bankruptcy trustee in a liquidation proceeding is vested with the authority to manage the debtor corporation (*id.* at 1195). Accordingly, the power to waive or assert the corporate debtor's attorney-client privilege is transferred to the trustee along with the other powers of management *(ibid.)*. The court below recognized the conflict with *Citibank*, but declined to follow it, based on its own interpretation of the Bankruptcy Code and the policies behind it and the attorney-client privilege (App., *infra*, 15a-16a).

b. The decision below also conflicts with the result in *In re O.P.M. Leasing Services, Inc.*, *supra*. In *O.P.M. Leasing*, the Second Circuit held that the trustee of a corporation undergoing reorganization pursuant to Chapter 11 of the Bankruptcy Code, 11 U.S.C. 1101 *et seq.*, could waive the corporation's attorney-client privilege over the objection of two of the corporation's former officers and directors, one of whom was its parent company's sole voting shareholder. While the court in *O.P.M. Leasing* stressed the fact that the debtor's board of directors was no longer in existence (670 F.2d at 386-387), the decision should not be distinguished on that basis. Whether or not pre-bankruptcy officers and directors formally retain their positions after a trustee is appointed, they thereafter lack the power to manage the corporation (see pages 9-11, *infra*). Accordingly, Frank McGhee, while technically still an officer and director of CDCB, possessed no greater authority in any relevant respect over the debtor than did the former officers and directors in *O.P.M. Leasing*. More generally, the *O.P.M. Leasing* court recognized that the management of a corporation is the proper entity to assert or waive its attorney-client privilege (670 F.2d at 387). When a trustee is appointed under Chapter 11, he

is granted broad management powers equivalent in relevant respects to a Chapter 7 trustee (see pages 10-11 & note 12, *infra*). It follows that the trustee has the power to waive the privilege in either case.

2. The court of appeals' decision rests on a misunderstanding of the law of corporations and bankruptcy.

a. The question raised by this case is who is the proper party to act for a corporation in asserting or waiving its attorney-client privilege when it is undergoing liquidation pursuant to Chapter 7 of the Bankruptcy Code. A corporation, as an artificial entity, must of course act through natural persons. The power to assert or waive the corporation's attorney-client privilege rests with its management—normally the board of directors—or those authorized by management to assert this power.[7] See, *e.g.*, *Citibank*, 666 F.2d at 1195; *Stewart Equipment Co.* v. *Gallo*, 32 N.J. Super. 15, 107 A.2d 527 (1954); Note, *The Lawyer-Client Privilege: Its Application to Corporations, the Rule of Ethics, and Its Possible Curtailment*, 56 Nw. U.L. Rev. 235, 243-244 (1961); see also *United States* v. *DeLillo*, 448 F. Supp. 840 (E.D.N.Y. 1978) (board of trustees of pension fund is proper entity to waive privilege, by analogy to corporations); cf. *Garner* v. *Wolfinbarger*, 430 F.2d 1093, 1103-1104 (5th Cir., 1970), cert. denied, 401 U.S. 974 (1971) (in derivative action, shareholders may for good cause overcome corporation's privilege). The corporation's privilege may not be asserted by individual directors or officers in their own right; indeed, the corporation may waive its privilege with respect to

[7] In practice, a large corporation is typically managed by its top officers, but their authority legally derives from that of the board of directors. See Eisenberg, *Legal Models of Management Structure in the Modern Corporation: Officers, Directors, and Accountants*, 63 Calif. L. Rev. 375 (1975). The distinctions generally drawn between officers and directors are not relevant to the issue raised by this petition.

communications made by a director or officer to the corporation's attorney. *E.g.*, *Diversified Industries, Inc.* v. *Meredith*, 572 F.2d 596, 611 n.5 (8th Cir. 1978) (en banc); *United States* v. *Piccini*, 412 F.2d 591, 593 (2d Cir., 1969); *In re Grand Jury Proceedings*, 434 F. Supp. 648 (E.D. Mich. 1977), aff'd per curiam, 570 F.2d 562 (6th Cir. 1978); *In re Grand Jury Subpoena Duces Tecum*, 391 F. Supp. 1029, 1034 (S.D.N.Y. 1975); Note, *The Attorney-Client Privilege: A Look at its Effect on the Corporate Client and the Corporate Executive*, 55 Ind. L.J. 407, 411 (1980).

The question in this case thus requires a determination of who, for purposes of assertion or waiver of the corporation's privilege, constitutes the "management" of a corporate debtor undergoing Chapter 7 liquidation. The issue is not, as the court below suggested (App., *infra*, 9a), whether the trustee technically "replace[s] the corporation as an entity" or "succeed[s] to the positions of [its] officers and directors." The answer must be found in the powers accorded a Chapter 7 trustee by the Bankruptcy Code and in the policies behind the attorney-client privilege as it applies in the corporate context.[8]

b. A debtor undergoing liquidation is required to "surrender to the trustee all property of the estate and any recorded information * * * relating to property of the estate"[9] (11 U.S.C. 521(3)). The trustee is "accountable for all property received" (11 U.S.C. 704(2)), and

[8] The legislative history of the Bankruptcy Code indicates that Congress left this issue to be determined by the courts. See 124 Cong. Rec. 32400 (1978) (remarks of Rep. Edwards); *id.* at 33999 (1978) (remarks of Sen. DeConcini).

[9] The estate is comprised in part of "all legal or equitable interests of the debtor in property [with certain enumerated exceptions,] as of the commencement of the case" (11 U.S.C. 541(a)(1)). It includes causes of action against officers and directors for misconduct and mismanagement. See 4 *Collier on Bankruptcy* ¶ 541.10[8], at 541-67 (15th ed. 1984).

is the legal representative of the estate, with the capacity to sue and be sued (11 U.S.C. 323). He is directed to reduce the property of the estate to money and "close up [the] estate as expeditiously as is compatible with the best interests of parties in interest" (11 U.S.C. 704(1)). He must "investigate the financial affairs of the debtor" (11 U.S.C. 704(3)), and is empowered to sue officers, directors and other insiders to recover fraudulent or preferential transfers of the debtor's property (11 U.S.C. 547(b)(4)(B), 548). If continued operation of the debtor's business for a limited time is desirable, the court "may authorize the trustee to operate the business" (11 U.S.C. 721). When a commodity broker is liquidated, the trustee is required to comply with certain instructions of customers, to answer certain margin calls, and to prevent commodity contracts from remaining open (11 U.S.C. 765, 766(a) and (b)). He may also "operate the business of the debtor" in order to close certain commodity contracts (11 U.S.C. 766(b)).

It is clear from the foregoing that a liquidation trustee is granted in all relevant respects complete management authority over the debtor.[10] See 2 *Collier on Bankruptcy* ¶ 323.01, at 323-2 (15th ed. 1984). Former management's role is limited to turning over the corporation's property to the trustee and to providing certain information to the trustee and creditors (11 U.S.C. 521, 343). In liquidation cases, and in reorganization cases where a trustee has been appointed[11] (see 11 U.S.C. 1107, 1108), former management is not authorized to continue operating the corporation's business.[12]

Because the liquidation trustee is granted, in essence, complete management authority, he is the proper party to waive or assert the corporate debtor's attorney-client privilege.[13] See generally Proposed Fed. R. Evid. 503(c), 56 F.R.D. 183, 236 (1972); *In re Grand Jury Proceedings*, 434 F. Supp. at 649, 650 n.1. Officers and directors of a debtor undergoing liquidation have been deprived of the authority to manage; there is no reason why they should be deemed to continue to possess the authority to act for the corporation with respect to its privilege. If such officers and directors object to a waiver of the privilege, it is solely as individuals; such objections are ineffective even with respect to their own communications (see pages 8-9, *supra*).

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[10] The court of appeals' failure to recognize this may be attributable to its confusion of various provisions of the Bankruptcy Code. The court relied almost exclusively on 15A W. Fletcher, *Private Corporations* § 7657 (rev. ed. 1981) in concluding that a corporation "is capable of numerous functions even after the filing of the petition in bankruptcy" (App., *infra*, 9a). The cited section of Fletcher's treatise, however, does not pertain to liquidation proceedings under present law, at least with respect to who has the power to act on behalf of the bankrupt entity.

[11] Under Chapter 11, a trustee may only be appointed for cause, such as "fraud, dishonesty, incompetence or gross mismanagement * * * by current management," or if such appointment is in the best interests of the estate and its beneficiaries (11 U.S.C. 1104(a)(1)). Under Chapter 7, by contrast, appointment or election of a trustee is automatic (11 U.S.C. 701, 702).

[12] While it is not necessary to reach the issue in order to decide this case, we note that when a trustee is appointed under Chapter 11, he should have the power to waive or assert the debtor corporation's attorney-client privilege for reasons analogous to those under Chapter 7. See generally 11 U.S.C. 323, 1106, 1108; 5 *Collier*, *supra*, *at* ¶ 1106.01.

[13] The trustee may also assert or waive the privilege because the power to do so is an intangible asset that passes to the trustee under the Bankruptcy Code (11 U.S.C. 521(3), 704). See *Citibank*, 666 F.2d at 1195; *O.P.M. Leasing*, 670 F.2d at 386 n.2; *In re Amjoe*, 11 Collier Bankr. Cas. 2d (MB) 45 (M.D. Fla. 1976). Cf. *Ex parte Fuller*, 262 U.S. 91 (1923) (trustee has the authority to disclose the books of a bankrupt partnership over the partners' claims of privilege).

c. This result serves the important policy of preventing former officers and directors from abusing the corporation's privilege in order to shield their own wrongdoing and prevent the effective assertion of valid claims by those injured by their actions. Decisions with respect to the privilege properly lie with the trustee, a fiduciary independent of prior management,[14] accountable for all property of the estate (11 U.S.C. 704(2)), and under a duty to the debtor and the creditors to realize as much as possible from the estate (4 *Collier*, *supra*, ¶ 704.,01[3], at 704-5). It is especially important for the trustee to investigate the conduct of prior management and to uncover and assert causes of action against the debtor's officers and directors (4 *Collier*, *supra*, ¶ 704.07, at 704-17—704-18). See generally 11 U.S.C. 704(3), 547, 548. Fulfillment of this duty would often be impossible if former management were allowed control over the corporation's attorney-client privilege.[15] See generally *In re Browy*, 527 F.2d 799, 802 (7th Cir. 1976).

In this very case, respondent Frank McGhee was convicted in 1983 of embezzling $3.5 million in CDCB's customer funds, in violation of Section 9(a) of the Commodity Exchange Act, 7 U.S.C. 13(a), and was sentenced to three years' incarceration. *United States* v.

[14] Directors and officers are "insiders" who may not vote in the election of the trustee (11 U.S.C. 101(25)(B)(i) and (ii), 702(a)(3)).

[15] The court of appeals' decision would presumably apply not only to investigations by government agencies, but also to the trustee's own examination of the debtor corporation's counsel. See generally, *e.g.*, 11 U.S.C. 542(e) (disclosure of recorded information to trustee is "[s]ubject to any applicable privilege"); *In re O.P.M. Leasing Services, Inc.*, *supra*; *In re Silvio De Lindegg Ocean Developments, Inc.*, *supra*. See also Brief of John K. Notz, Jr., Trustee, as Amicus Curiae 3-4 (examination of Weintraub was undertaken by trustee as well as by the CFTC).

Frank McGhee, No. 83 CR 262-1 (N.D. Ill. Oct. 7, 1983). Where, as here, the corporation may have causes of action against its officers and directors for fraud or other wrongful conduct, those individuals clearly have a conflict of interest with respect to whether the corporation's attorney-client privilege should be exercised. Cf. *Pepper* v. *Litton*, 308 U.S. 295, 306 (1939). Allowing the very insiders who may have defrauded the corporation to veto the trustee's waiver of the privilege would poorly serve the interests of the debtor and its beneficiaries, and would defeat the privilege's purpose of "promot[ing] broader public interests in the observance of law and administration of justice" (*Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981)).[16] See generally *Valente* v. *Pepsico, Inc.*, 68 F.R.D. 361, 369-370 n.16 (D. Del. 1975); cf. *Garner* v. *Wolfinbarger*, *supra*.

On the other hand, the policy concerns expressed by the court of appeals (App., *infra*, 9a-11a) are misplaced.[17] The "potential chilling effect on attorney-client communications" (*id.* at 10a) is no greater here than in the case of a solvent corporation: individual officers and directors always run the risk that present or successor management may waive the corporation's privilege with respect to their communications with

[16] It should also be noted that special fiduciary obligations are owed by officers of commodity brokers. See *Gordon* v. *Shearson Hayden Stone, Inc.*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,016, at 23,976 n.16 (1980), aff'd mem. *sub nom. Shearson Loeb Rhoades, Inc.* v. *CFTC*, 673 F.2d 1339 (9th Cir. 1982); *In re Rosenbaum Grain Corp.*, 103 F.2d 656, 661 (7th Cir. 1939).

[17] The court's concerns are especially unpersuasive because it failed to take into account that the attorney-client privilege, which inhibits the truth-seeking process, must be "strictly confined within the narrowest possible limits consistent with the logic of its principle." 8 *Wigmore on Evidence* § 2291, at 554 (McNaughton rev. 1961). See, *e.g.*, *Trammel* v. *United States*, 445 U.S. 40, 50 (1980).

counsel (see pages 8-9, *supra*). The chilling effect, if any, arises in all such cases from the fact that the privilege is that of the corporation, not its officers or directors.[18] The court's statement (App., *infra*, 9a) that waiver by the trustee would "condone an inequality of treatment between bankrupt corporations and bankrupt individuals" is also unpersuasive. Corporations, as "artificial creature[s] of law" (*Upjohn Co.* v. *United States*, 449 U.S. 383, 389-390 (1981)), must act through natural persons to exercise their rights. It does not discriminate against a corporation to designate the trustee—who now constitutes the "management"—as the person to act on its behalf.[19] Finally, the court's concern (App., *infra*, 10a) over discrimination against bankrupt corporations as compared to solvent ones is groundless. The same rule applies to both: the privilege may be waived by management. Any difference in treatment results from the fact that the management of a corporation undergoing liquidation is placed in the hands of a trustee pursuant to the Bankruptcy Code.[20] Indeed, the court of appeals' decision could work to the disadvantage of corporations in bankruptcy by pre-

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[18] If counsel was also acting as an attorney for the individual officer or director, the individual may be able to assert his own attorney-client privilege. *E.g.*, *Diversified Industries, Inc.* v. *Meredith*, 572 F.2d at 611 n.5.

[19] The court's statement (App., *infra*, 10a) that waiver by the trustee would allow the attorney-client privilege to "vanish" on the "whim" of the trustee is plainly incorrect. The trustee's waiver must be based on his judgment as to the best interests of the estate (see page 12, *supra*), not on a "whim." And waiver of the privilege by the trustee, acting for the debtor, no more causes the privilege to "vanish" than does any other proper waiver by the party authorized to make it.

[20] Of course the Bankruptcy Code is premised on the need to treat insolvent individuals and corporations differently from solvent ones. The Code provides debtors with certain important advantages, such as a stay of creditors' actions (11 U.S.C. 362).

venting them from discovering valid claims against officers and directors. See pages 12-13, *supra*.

3. The decision of the court of appeals will seriously impede the government's ability to enforce federal criminal, commodity, and securities laws by shielding vital information from investigators and administrative agencies and foreclosing an important avenue of voluntary cooperation between the government and bankruptcy trustees. It will, for example, substantially hinder the CFTC's ability to investigate and prosecute insiders of bankrupt commodity corporations. Because insiders' fraud frequently precipitates commodity firms' bankruptcies,[21] the Commission's effectiveness is especially important in this context.[22] See generally H.R. Rep. 95-595, 95th Cong., 1st Sess. 271 (1977) (Chapter 7 liquidation procedures for commodity brokers designed to give their customers "special protection"). The Securities and Exchange Commission (SEC) would similarly be adversely affected in its enforcement of

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[21] See, *e.g.*, *In re Group J. David, Inc.* and *In re J. David Dominelli*, No. 84-00633/634-P-INV-7 (Bankr. S.D. Cal. filed Feb. 13, 1984); *In re J. David Securities*, No. 84-01309-LM7 (Bankr. S.D. Cal. filed Mar. 22, 1984); *In re Financial Partners, Ltd.*, No. 82-B-14-353 (Bankr. N.D. Ill. filed Oct. 22, 1982); *In the Matter of T&D Management Co.*, Nos. 81-02568, 02569, 02570 (Bankr. D. Utah filed Aug. 10, 1981); *In re Incomco, Inc.*, No. 80 13 11217 (Bankr. S.D.N.Y. filed Aug. 1, 1980); *In re Auric Equities Corp.*, No. 80-13-10283 (Bankr. S.D.N.Y. filed Feb. 27, 1980); *In re Trending Cycles for Commodities, Inc.*, No. 80-00099-BKC-TCB (Bankr. S.D. Fla. filed Jan. 31, 1980).

[22] The trustee is required to furnish, on request, information concerning the estate and its administration (including facts ascertained with respect to fraud, misconduct and mismanagement) to any party in interest (11 U.S.C. 704(6)). The CFTC has the right to raise, appear and be heard on any issue in a commodity broker liquidation (11 U.S.C. 762), and qualifies as a party in interest. As such, the Commission has participated in the CDCB liquidation.

federal securities laws,[23] as would the government's use of grand juries to investigate persons associated with bankrupt corporations[24] and its prosecution of fraud relating to bankruptcy cases under 18 U.S.C. 152.

The voluntary cooperation of trustees with the government in the latter's investigations of prior management—including, where appropriate, waiver of the attorney-client privilege—is common because it is often in the interest of the estate to allow the government to undertake the burden and expense of such investigations, and then to file civil actions in their wake.[25] In and out of the bankruptcy context, voluntary cooperation by persons or corporations being investigated by the government is extremely important to the effective enforcement of the law.[26]

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[23] Insider misconduct often results in the bankruptcy of publicly held corporations when that conduct comes to light. See, *e.g.*, *In re Equity Funding Corp.*, 375 F. Supp. 1378, 1380-1381 (J.P.M.D.L. 1974); *In re Saxon Industries, Inc.*, 29 Bankr. 319 (Bankr. S.D.N.Y. 1983). In part because of the frequency of such occurrences, the SEC has the right to participate in reorganization proceedings under Chapter 11 (11 U.S.C. 1109(a)). See S. Rep. 2073, 75th Cong., 3d Sess. 6-10 (1938).

[24] During a grand jury investigation in the Southern District of Illinois, for example, counsel for a corporation undergoing Chapter 11 reorganization, at the behest of its former officers and contrary to the waiver of the trustee, relied on the decision below to invoke the attorney-client privilege on behalf of the corporation, thereby shielding the officers from potentially damaging revelations concerning possible securities fraud and other violations. *In re Grand Jury Proceedings*, No. 83-3337 (S.D. Ill.).

[25] Where such cooperation is not, in the trustee's judgment, in the best interests of the estate because of possible third-party claims against it, the trustee presumably would not waive the privilege.

[26] Indeed, voluntary cooperation by corporations with the SEC is so common that an entire body of law has developed with respect to whether a voluntary waiver of the attorney-client privilege in favor of the SEC also waives the privilege with respect to others who seek the same information. See, *e.g.*, *Permian Corp.* v. *United States*, 665 F.2d 1214 (D.C. Cir. 1981); *Diversified Industries, Inc.* v. *Meredith*, *supra*.

The decision below also undermines the ability of the United States Trustees and the private bankruptcy trustees they supervise to perform their statutory obligations.[27] Although corporate liquidations occur less frequently than Chapter 7 cases filed by individuals, corporate bankruptcies administered by United States Trustees usually involve significantly larger assets and liabilities; they have a disproportionate impact on the administration of the bankruptcy law because of their size, importance and complexity. Trustees in these cases are regularly confronted with inadequate or missing records coupled with allegations of fraud or preferential dealings by corporate officers. The waiver of the attorney-client privilege is of great practical concern because the attorney of a bankrupt corporation is often the best (and sometimes the only) repository of information about the corporation's prior affairs. If the trustee cannot obtain this information himself or authorize its disclosure to interested government agencies whose investigations coincide with the interests of the corporation and its creditors, he will be deprived of an important tool for the effective exercise of his responsibilities. See 11 U.S.C. 704(1) and (3).[28]

The principal application of the decision below will be to situations where prior management has, through ille-

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[27] United States Trustees serve in 18 judicial districts to supervise the administration of Chapter 7 cases and private trustees appointed in those cases (28 U.S.C. 586(a)(1) and (3)). When a private trustee is not available for appointment, the United States Trustee is authorized to act as trustee. 11 U.S.C. 15701(b).

[28] The Securities Investor Protection Corporation would also be adversely affected in its ability to protect the customers of stockbrokers that undergo bankruptcy proceedings. See 15 U.S.C. 78aaa *et seq*.

gal actions, injured the corporation and its creditors, shareholders, and customers. It grants officers and directors of insolvent corporations the power to foreclose effective investigation into their own misconduct, and will thereby frustrate the legitimate efforts of bankruptcy trustees and law enforcement authorities.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1984

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 82-2420

COMMODITY FUTURES TRADING COMMISSION,
PETITIONER-APPELLEE

v.

GARY WEINTRAUB, RESPONDENT, AND
FRANK H. MCGHEE AND ANDREW MCGHEE,
INTERVENING RESPONDENTS-APPELLANTS

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 81 C 6996—**Nicholas J. Bua,** *Judge*
and **Carl B. Sussman,** United States *Magistrate.*

ARGUED APRIL 8, 1983—DECIDED NOVEMBER 21, 1983

Before PELL and COFFEY, *Circuit Judges*, and WEIGEL, *District Judge.* *

WEIGEL, *District Judge*. Two individuals, both officers and shareholders in a bankrupt corporation, appeal from an order of the United States District Court for the Northern District of Illinois, Eastern Division, pursuant to 28 U.S.C. § 1291. The district court, by minute order, affirmed a United States Magistrate's order that the trustee in bankruptcy of the bankrupt firm had the authority to waive the corporation's attorney-client

* The Honorable Stanley A. Weigel, Senior District Judge for the United States District Court for the Northern District of California, is sitting by designation.

privilege, as to "all communications or information ... occurring or arising on or before" the date the petition in bankruptcy was filed.[1] For the reasons set out below, we reverse.

I

Chicago Discount Commodity Brokers, Inc. ("CDCB") was a discount commodity brokerage house registered with the Community [sic] Futures Trading Commission (the "Commission") as a futures commission merchant. On October 27, 1980, the Commission filed a complaint against CDCB in the United States District Court for the Northern District of Illinois alleging violations of the Commodity Exchange Act, 7 U.S.C. § 6d(2) (Supp. III 1979). Also, on October 27, 1980, a consent decree was entered into, which provided, *inter alia*, for an immediate freeze on corporate assets, the appointment of a receiver, and that the Commission would be permitted to investigate CDCB's operations. The district court appointed John K. Notz ("Notz") of the Chicago law firm of Gardner, Carton & Douglas as equity receiver.

On November 4, 1980, Notz, as receiver, filed a voluntary petition in bankruptcy on behalf of CDCB. *In re Chicago Discount Commodity Brokers, Inc.*, No. 80 B 14472 (Bankr. N.D. Ill.). The petition sought relief under Subchapter IV of Chapter 7 of the Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 761-766 (1979), which provides for liquidation of bankrupt commodity brokers. The bankruptcy court initially appointed Notz as First Interim Trustee and, later, Permanent Trustee of CDCB.

On January 28, 1981, the Commission served an administrative subpoena *duces tecum* upon respondent, Gary Weintraub ("Weintraub"), in connection with its

[1] *See Commodity Futures Trading Commission* v. *Weintraub*, No. 81-C-6996, *slip op.* at 2 (N.D. Ill. April 26, 1982).

investigation of CDCB. Weintraub formerly had represented CDCB as one of its attorneys. Weintraub appeared for deposition on February 26 and 27, 1981, and, on August 26, 1981, answering approximately 800 questions in all. However, he refused to answer 23 other questions, asserting the attorney-client privilege. On December 15, 1981, the Commission filed a motion to compel answers to those 23 questions. Nevertheless, on March 11, 1982, Notz, as trustee in bankruptcy, waived the attorney-client privilege on behalf of CDCB, as to "any communications or information occurring or arising on or before October 27, 1980."[2]

On April 26, 1982, a United States Magistrate granted the Commission's motion to compel answers and directed Weintraub to appear within thirty days of the date of the order to respond to the Commission's questions. The Magistrate concluded that, although Weintraub had properly asserted the privilege, that privilege was subsequently waived by Notz. On May 6, 1982, Weintraub filed an objection to the Magistrate's order. The district court upheld that order on June 9, 1982.

On June 30, 1982, the district court granted Frank and Andrew McGhee (the "McGhees") leave to intervene in the Commission's action against Weintraub. In addition to being CDCB shareholders, both McGhees are corporate officers. Frank McGhee is CDCB's President and Andrew McGhee its Vice President.[3]

[2] *See* Letter from John K. Notz, Jr., to Constantine J. Gekas, Esq. (March 11, 1982).

[3] The McGhees are alternatively described in the record as "officers" and "former officers" of CDCB. Nothing in the record indicates that the McGhees have resigned their corporate offices, nor is there any possibility that Notz, due to his appointment as trustee in bankruptcy, has succeeded to the McGhees' positions. *See* 15 A, W. Fletcher, *Private Corporations* § 7657 (Rev. Ed. 1981). Consequently, we have concluded that the McGhees are most accurately termed "officers" of CDCB.

On July 27, 1982, the district court clarified its June 9, 1982, order and ruled that "[r]espondent shall respond to specific questions at issue without asserting an attorney-client privilege on behalf of Chicago Discount Commodity Brokers, Inc." On September 21, 1982, the McGhees moved the district court for a stay of the July 27, 1982, order, pending appeal of that order. The district court denied the motion. On October 18, 1982, this Court denied an appeal from the denial of the motion for stay. In addition, on November 4, 1982, this Court denied the McGhee's motion for reconsideration of the October 18 decision.[4]

The instant appeal is from the district court's July 27, 1982, order directing Weintraub to respond to the Commission's inquiries without asserting the attorney-client privilege on behalf of CDCB.

II

Whether the trustee of a bankrupt corporation may waive the attorney-client privilege on behalf of the corporation is a question of first impression in this Court. We undertake first to set out the purposes of the attorney-client privilege, and the application of the privilege in the corporate context.

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[4] Following this Court's October 18, 1982, denial of a stay pending appeal, Commission counsel made several unsuccessful attempts to schedule Weintraub for deposition. On November 8, 1982, the Commission moved the district court for an order compelling respondent to appear on November 12, 1982, to respond to questions without asserting the attorney-client privilege. The district court denied the motion pending a ruling by this Court on intervenor's motion for reconsideration of the stay pending appeal. By Order of November 4, 1982, this Court denied the motion for reconsideration. The Commission then renewed its motion in the district court for entry of an order setting the date of respondent's deposition on November 12, 1982. The district court continued the Commission's renewed motion pending the outcome of the instant appeal.

Federal Rule of Evidence 501 governs the use of all privileges in the federal courts. The rule provides that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." On numerous occasions, the Supreme Court has spoken on the purpose of the attorney-client privilege. *See, e.g., Upjohn Co.* v. *United States*, 449 U.S. 383 (1981); *Trammel* v. *United States*, 445 U.S. 40 (1980); *Fischer* v. *United States*, 425 U.S. 391 (1976); *Hunt* v. *Blackburn*, 128 U.S. 464 (1888). The purpose of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interest in the observance of law and administration of justice." *See Upjohn Co.* v. *United States*, 449 U.S. at 389. The privilege "rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." *See Trammel* v. *United States*, 445 U.S. at 51. The privilege thus exists to promote full disclosure by the client, and to foster a relationship of trust between attorney and client. The assumption underlying the privilege is that "the benefits derived from encouraging communications outweigh the costs of keeping information from other parties." *See* Note, "Attorney-Client Privilege for Corporate Clients: The Control Group Test", 84 Harv. L. Rev. 424, 425 (1970).

That the attorney-client privilege adheres to corporations as well as to individuals is not subject to dispute. *See Radiant Burners, Inc.* v. *American Gas Ass'n.*, 320 F.2d 314, 323 (7th Cir.), *cert. denied*, 375 U.S. 929 (1963). Of course, as an artificial entity, the corporation cannot speak for itself, but must rely on its officers and agents for exercise of the attorney-client privilege. *See Upjohn Co.* v. *United States*, 449 U.S. at 390-91.

A related question is whether the corporate attorney-client privilege exists after the corporation enters bankruptcy. A number of courts have agreed that a corporation entering bankruptcy retains the attorney-client privilege. *See In re O.P.M. Leasing Services, Inc.*, 670 F.2d 383, 385 (2d Cir. 1982); *People's Bank* v. *Brown*, 112 F.2d 652, 654 (3d Cir.1902). However, in this case, the parties disagree as to who may waive the attorney-client privilege on behalf of the bankrupt corporation. Appellants argue that they, as officers and shareholders, have sole authority to waive. Appellee, on the other hand, contends that only the trustee in bankruptcy of the debtor corporation can waive.

On the issue as to whether a trustee in bankruptcy may waive the corporate attorney-client privilege, only two appellate decisions have come to our attention. Relied upon by appellee, they are *In re O.P.M. Leasing Services, Inc.*, 670 F.2d 383, and *Citibank, N.A.* v. *Andros*, 666 F.2d 1192 (8th Cir. 1982). Although both of these cases held that the trustee in bankruptcy had the power to waive the attorney-client privilege on behalf of the corporation, both are distinguishable from the instant case.

In *O.P.M. Leasing*, O.P.M. Leasing Services, Inc. ("O.P.M.") was a computer leasing and financing concern that filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Reform Act, 11 U.S.C. § 101 *et seq*. Shortly after this Chapter 11 proceeding was commenced, O.P.M.'s president and vice president, who composed the entirety of the corporation's board of directors, resigned. In the course of the reorganization proceeding, the trustee in bankruptcy waived O.P.M.'s attorney-client privilege, pursuant to a request by the United States Attorney for the Southern district of New York.[5] The then former president

[5] The United States Attorney had convened a grand jury to investigate O.P.M. and its officers, and had served on the trustee a subpoena *duces tecum* requiring the production of certain O.P.M. records. The United States Attorney also requested that the trustee waive the corporation's attorney-client privilege with respect to the records.

and vice president opposed the waiver, claiming that only the former president could rightly waive the bankrupt's privilege. The bankruptcy court rejected their argument, holding that the trustee in bankruptcy succeeded to the right of the corporation to assert or waive the attorney-client privilege. The United States District Court for the Southern District of New York affirmed. On appeal, the Second Circuit also affirmed but narrowly limited its holding: "We hold that *in this situation* the power to make such a decision as is encompassed by assertion or waiver of the important attorney-client privilege adheres to the trustee by virtue of the *nonexistence of any other entity authorized to so act.*" *O.P.M. Leasing*, 670 F.2d at 387 (emphasis added.)[6]

This case does not present the same "situation" as that in *O.P.M. Leasing*. The record herein does not show that CDCB is currently without a board of directors and/or corporate officers. Nor does the record show that the McGhees have resigned their corporate offices, as their O.P.M. counterparts did. In short, the Commission has failed to demonstrate the "nonexistence of any entity authorized to waive" CDCB's attorney-client privilege.

Citibank, N.A. v. *Andros*, 666 F.2d at 1192, is closer to the present case, in that the officers of the bankrupt corporation, who had not resigned their offices, asserted the attorney-client privilege on behalf of the corporation. There are, however, a number of factual dis-

[6] The *O.P.M. Leasing* court based its decision on an analysis of the "competing interests" of the former officers and the trustee, and on an examination of New York corporation law. the court did not discuss the purposes of the attorney-client privilege, nor did the court analyze the argument that the power to waive the attorney-client privilege passes to the trustee with the property of the corporate debtor.

tinctions between *Citibank* and the instant case.[7] Apart from these distinctions, we note that in *Citibank*, the court relied heavily on an unpublished district court order from another Circuit.[8] *See* 666 F.2d at 1195, *citing In re Continental Mortgage Investors*, *slip op.* (D. Mass. July 31, 1979). After careful consideration, we do not agree with the conclusion reached in the cited slip opinion and therefore do not follow *Citibank*.

III

The Commission additionally contends that statutory law empowers the trustee in bankruptcy to waive the corporate attorney-client privilege. The trustee's authority is derived mainly from the Bankruptcy Reform Act of 1978 (the "Act"), 11 U.S.C. § 101 *et seq.* Relief under the Act is available to both individuals and corporations. *See* 11 U.S.C. § 101(30). The duties of the trustee in a Chapter 7 liquidation proceeding are extensive and primarily involve the collecting and reducing to money of the property of the debtor. *See* 11 U.S.C. § 704. Further duties are imposed upon the

[7] In *Citibank*, the corporate officers challenging the purported waiver were not, as here, shareholders in the bankrupt corportion. Moreover, the debtor corporation in *Citibank* did not have court-appointed counsel, as CDCB does here. *See In re Chicago Discount Commodity Brokers, Inc.*, No. 80 B 14472, *slip op.* (Bankr. N.D. Ill., Nov. 24, 1980). Notz did not consult counsel before waiving CDCB's privilege. In addition, it does not appear that *Citibank* involved a Chapter 7 bankruptcy proceeding, as does the instant case.

[8] In reaching its decision, the district court cited no authority and stated only that in Chapter X proceedings, the court had "no doubt that the right to make such decisions passes to the Chapter X trustees." *In re Continental Mortgage Investors*, No. 79-593-5, *slip op.* at 2. The Eighth Circuit in *Citibank* relied heavily on this case in concluding that "the right to assert or waive that privilege passes with the property of the corporate debtor to the trustee." 666 F.2d at 1195.

trustee where the corporate debtor was a commodity broker. *See* 11 U.S.C. §§ 761-766.[9]

Appellee maintains that because of these broad management powers, the trustee also possesses the authority to assert the attorney-client privilege on behalf of the corporate debtor. Essentially, appellee would have us believe that the right to assert or waive the attorney-client privilege passes with the property of the corporate debtor to the trustee. *See Citibank, N.A.* v. *Andros*, 666 F.2d at 1195. Appellee's argument is unpersuasive for several reasons.

First, although the trustee holds broad management powers for the corporate debtor, he does not replace the corporation as an entity. The corporation is capable of numerous functions even after the filing of the petition in bankruptcy. *See* 15 A, W. Fletcher, *Private Corporations* § 7657 (Rev. Ed. 1981). Nor does the trustee succeed to the positions of the officers and directors of the corporation. *Id.* In brief, the corporation exists, and will continue to exist, until formally dissolved by action of its shareholders or by the state where the firm is incorporated. *See In re Amjoe, Inc.*, 11 Collier Bankr. Cas. 45 (Bankr. M.D. Fla. 1976). The trustee may hold the power to manage the bankrupt corporation's property and assets, but he does not thereby acquire absolute power over the corporation's legal rights.

Second, to accept appellee's argument would be to condone an inequality of treatment between bankrupt corporations and bankrupt individuals with regard to the attorney-client privilege. Under the Bankruptcy Reform Act, as under prior bankruptcy laws, individual debtors are subject to public examination by the trustee. *See* 11 U.S.C. § 343. The debtor has a clear

[9] Although the Act confers broad powers on the trustee, nowhere is the trustee given specific statutory authority either to assert or waive a corporate debtor's attorney-client privilege.

right to assert privileges during this examination. *See In re Blier Cedar Co.*, 10 B.R. 993 (Bankr. D. Me. 1981). *See also 2 Collier on Bankruptcy*, ¶ 343.12 (15th ed. 1982). There is little authority to support the position that the individual debtor's attorney-client privilege passes to the trustee in bankruptcy.[10] Such a passing of the privilege could engender the absurd result of the trustee waiving the debtor's privilege as to information sought by the trustee. The attorney-client privilege would then vanish whenever the trustee, at his whim, determined that information from the debtor was necessary. By adopting appellee's contention, we would subject a debtor corporation to precisely such a risk. We perceive no reason to afford a corporate debtor less protection than that afforded an individual debtor in bankruptcy.

Third, allowing the trustee in bankruptcy to waive the attorney-client privilege of the corporate debtor discriminates against the corporate debtor solely on the basis of economic status. A solvent corporation, as long as it remains solvent, can freely assert or waive its attorney-client privilege. Once the corporation enters bankruptcy, however, it would lose to the trustee the power to control the privilege. While the trustee's interest in investigating the affairs of the corporate debtor on behalf of the creditors is certainly legitimate, it does not justify erosion of the corporation's attorney-client privilege simply on the basis of a change in economic circumstances.

Finally, and most importantly, we reject the Commission's argument because of its potential chilling effect on attorney-client communications. If the trustee in bankruptcy is permitted to waive the corporate debtor's privilege, the trust inherent in the attorney-client

[10] *See In re Smith*, 24 B.R. 3 (Bankr. S.D. Fla. 1982). This case relied upon the reasoning of *O.P.M. Leasing* and *Citibank*, which we, for the reasons stated above, decline to accept.

relationship will be jeopardized. Corporate clients will be wary of communicating fully with their attorneys for fear that sensitive information could subsequently be disclosed due to bankruptcy. Free interchange between attorney and client is the cornerstone of effective legal representation.

Therefore, we have concluded that the trustee in bankruptcy of a corporate debtor does not have the power to waive the corporation's attorney-client privilege as to any communications or information occurring or arising on or before the date the petition in bankruptcy was filed.[11]

Reversed.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[11] CFTC also argues that the McGhees lack standing to challenge the trustee's waiver of CDCB's attorney-client privilege. The McGhees, as officers and shareholders of CDCB, clearly possess the requisite interest for standing.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 82-2420

In the Matter of
an Application to Enforce
an Administrative Subpoena of the
COMMODITY FUTURES TRADING COMMISSION,
PETITIONER-APPELLEE

v.

GARY WEINTRAUB, RESPONDENT, and
FRANK H. MCGHEE AND ANDREW MCGHEE,
INTERVENING RESPONDENTS-APPELLANTS.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
Civil Action No. 81 C 6996
Nicholas J. Bua, *Judge*

March 19, 1984

Before
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. STANLEY A. WEIGEL, *Senior District Judge* *

*Stanley A. Weigel, Senior District Judge from the United States District Court for the Northern District of California, is sitting by designation.

The court on its own motion, being duly advised, now withdraws its opinion issued in slip opinion form on November 21, 1983.

And the court now reissues its revised and amended opinion in this case, said revised opinion being in the form and words of the opinion issued November 21, 1983 with the exception of certain amendments thereto which are set forth in the attached exhibit which is incorporated herein by reference.

The Commodity Futures Trading Commission having filed its petition for rehearing with suggestion of rehearing *en banc* and the court having permitted certain amicus briefs to be filed supporting the petition for rehearing, any revisions or amendments to said petition for rehearing or amicus briefs shall be filed within fourteen days of the date of this order, and upon the failure to file any amendments or revisions, it will be assumed that the petition for rehearing and the amicus briefs are redirected to the opinion of this court as presently revised. A response to the suggestion for rehearing *en banc* having been called for heretofore, the intervenor-appellees shall have ten days in which to respond to any revisions or amendments to the petition for rehearing or amicus briefs.

IT IS SO ORDERED.

EXHIBIT

References herein are to the slip opinion of this court's opinion issued November 21, 1983.

Delete the sentences concluding the paragraph and substitute:

> Frank McGhee is president of CDCB, and until October 21, 1980, Andrew McGhee was an officer and director of the corporation.

Pp. 3-4, footnote 3:

Replace the footnote with the following:

> [3] A supplement to the record filed by the Commission in conjunction with its motion for rehearing shows that Andrew McGhee resigned his positions as officer and director of CDCB on October 21, 1980. Larry Cote, the corporate secretary and vice president, resigned the following day. After October 22, Frank McGhee was the sole director and officer of CDCB. Nothing in the record indicates that Frank McGhee resigned these positions. Nor did Notz, through his appointment as receiver or as trustee in bankruptcy, succeed to Frank McGhee's positions. *See* 15A W. Fletcher, *Private Corporations* §§ 7396, 7657 (Rev. Ed. 1981). Consequently, we conclude that Frank McGhee remains an "officer" and "director" of CDCB.

Pp. 6, mid-page to roman III, p. 8:

Replace this material with the following:

> In both of these cases, the court upheld the trustee's power to waive the attorney-client privilege on behalf of the corporation.
>
> In *O.P.M. Leasing*, O.P.M. Leasing Services, Inc. ("O.P.M.") was a computer leasing and financing concern that filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Reform Act, 11 U.S.C. §§ 101 *et seq*. Shortly after this Chapter 11 proceeding was commenced, O.P.M.'s president and vice president, who composed the entirety of the corporation's board of directors, resigned. In the course of the reorganization proceeding, the trustee in bankruptcy waived

> O.P.M.'s attorney-client privilege, pursuant to a request by the United States Attorney for the Southern District of New York.[5] The then former president and vice president opposed the waiver, claiming that only the former president could rightly waive the bankrupt's privilege. The bankruptcy court rejected this argument, holding that the trustee in bankruptcy succeeded to the right of the corporation to assert or waive the attorney-client privilege. The United States District Court for the Southern District of New York affirmed.
>
> On appeal, the Second Circuit also affirmed. Its conclusion, however, was expressly premised upon "the crucial fact . . . that there has been no board of directors of OPM in existence during the tenure of the trustee. *O.P.M. Leasing*, 670 F.2d at 386. The court's holding was thus narrowly limited: "We hold that *in this situation* the power to make such a decision as is encompassed by assertion or waiver of the important attorney-client privilege adheres to the trustee by virtue of the *nonexistence of any other entity authorized to so act.*" *Id.* at 387 (emphasis added).[6]
>
> This case is different from *O.P.M. Leasing* because Frank McGhee remains an officer and director of CDCB, the debtor corporation. Thus, the record does not show the "nonexistence of any other entity" authorized to waive CDCB's attorney-client privilege. Nor does the record show that Frank McGhee waived or relinquished control of the corporate attorney-client privilege when he consented to the transfer of corporate assets to Notz as receiver.[7]
>
> The facts in *Citibank, N.A.* v. *Andros* are close to those in the present case, in that the officers of the bankrupt corporation, who had not resigned their offices, asserted the attorney-client privilege on behalf of the corporation. The Eighth Circuit reversed the district court's ruling that the trustee

could not waive the privilege on behalf of the corporation. 666 F.2d at 1193. In reaching this conclusion, the court reasoned that the right to assert or waive the attorney-client privilege passes with the property of the corporate debtor to the trustee. *Id.* at 1195. No authority was cited to support this interpretation except an unpublished district court order from another circuit. *See id.* (citing *In re Continental Mortgage Investors*, No. 79-593-S, slip op. at 2 (D. Mass. July 31, 1979)). The court did not address the policy in favor of encouraging full disclosure that lies beneath the attorney-client privilege. Nor did it explain why communications between a corporation and its attorney should be treated differently in bankruptcy than communications between an individual and his attorney. After careful consideration, we do not agree with the conclusion reached in *Citibank* and the cited slip opinion that the corporate right to assert or waive the attorney-client privilege is a form of property that passes to a the trustee upon bankruptcy. *Cf. O.P.M. Leasing*, 670 F.2d at 386 n.2 (declining to assess the merit of the *Citibank* reasoning). We therefore do not follow those decisions.

P. 8, footnote 7:

Replace the existing footnote with the following:

[7] In its petition for rehearing, the Commission suggests that all authority to exercise the attorney-client privilege passed from McGhee to Notz by virtue of the October 27, 1980 consent decree. Part III of the Order of Preliminary Injunction and Other Relief filed as a part of the decree recites in detail the transfer of assets and powers from the corporate officers and directors to Notz as receiver. This highly specific list contains no mention of a release to the receiver of power to claim or waive the attorney-client privilege. We therefore conclude that McGhee as corporate president did not relinquish control of the attorney-client privilege when CDCB entered receivership.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Cause No. 81 C 6996

COMMODITY FUTURES TRADING COMMISSION

v.

GARY WEINTRAUB

Presiding Judge: Honorable Nicholas J. Bua

Dated: July 27, 1982

The court clarifies its order of June 9, 1982 to provide that Respondent shall respond to the specific questions at issue without asserting an attorney-client privilege on behalf of Chicago Discount Commodity Brokers, Inc.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Cause No. 81 C 6996

COMMODITY FUTURES TRADING COMMISSION

v.

GARY WEINTRAUB

Presiding Judge: Honorable Nicholas J. Bua

Dated: June 9, 1982

Ordered that respondent, GARY WEINTRAUB, appear before representatives of the Commodity Futures Trading Commission and fully respond to the questions which are the subject of the Commission's Application without asserting an attorney-client privilege.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action No. 81-C-6996

In the Matter of
An Application to Enforce
an Administrative Subpoena of the

COMMODITY FUTURES TRADING COMMISSION,
APPLICANT,

v.

GARY A. WEINTRAUB, RESPONDENT.

ORDER

This matter coming to be heard on the COMMODITY FUTURES TRADING COMMISSION's ("CTFC") Application for an Order to Show Cause and Order to Compel Answers to Questions posed to GARY A. WEINTRAUB ("WEINTRAUB"),

The Court being fully advised in the premises and oral argument having been completed on this matter,

The Court finds and concludes that, during his investigative testimony on August 26, 1981, the Respondent WEINTRAUB properly asserted the attorney/client privilege of the now defunct firm of Chicago Discount Commodity Brokers, Inc. ("CDCB") to the questions of the CFTC, as set forth in the CFTC's Application,

The Court further finds, however, that on March 11, 1982, the Interim Bankruptcy Trustee of CDCB, John K. Notz, Jr., successor in interest of all assets, rights and privileges of CDCB, including the attorney/client

privilege at issue herein, waived that privilege of the firm for all communications or information (with an exception not pertinent herein) occurring or arising on or before October 27, 1980.

IT IS THEREFORE HEREBY ORDERED that the Respondent, WEINTRAUB, appear before representatives of the CFTC in Chicago, Illinois at a time and place mutually convenient to the parties, but no later than thirty days from the date of this Order, and respond to the various questions which are the subject of the CFTC's Application without asserting an attorney/client privilege.

DATED: April 26, 1982

ENTER: _____
Carl B. Sussman
U.S. Magistrate

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 82-2420

In the Matter of
an Application to Enforce
an Administrative Subpoena of the
COMMODITY FUTURES TRADING COMMISSION,
PETITIONER-APPELLEE,

v.

GARY WEINTRAUB, RESPONDENT, and
FRANK H. MCGHEE AND ANDREW MCGHEE,
INTERVENING RESPONDENTS-APPELLANTS.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
Civil Action No. 81 C 6996
Nicholas J. Bua, *Judge*

April 18, 1984

Before
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. STANLEY A. WEIGEL, *Senior District Judge**

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*Stanley A. Weigel, Senior District Judge from the United States District Court for the Northern District of California, is sitting by designation.

On consideration of the amended petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by the Commodity Futures Trading Commisssion, petitioner-appellee, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 82-2420

COMMODITY FUTURES TRADING COMMISSION,
PETITIONER-APPELLEE,

v.

GARY WEINTRAUB, RESPONDENT, and
FRANK H. MCGHEE AND ANDREW MCGHEE,
INTERVENING RESPONDENTS-APPELLANTS.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 81-C-6996—**Nicholas J. Bua,** *Judge* and
Carl B. Sussman, United States *Magistrate*

November 21, 1983

Before
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. STANLEY A. WEIGEL, *Senior District Judge**

JUDGMENT—ORAL ARGUMENT

Opinion by Judge Weigel

***The Honorable Stanley A. Weigel, Senior District Judge for the United States District Court for the Northern District of California, is sitting by designation.**

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, in accordance with the opinion of this Court filed this date.

APPENDIX H

The Bankruptcy Reform Act of 1978 (11 U.S.C. 101 *et seq.*) provides in pertinent part:

§ 323. **Role and capacity of trustee**

(a) The trustee in a case under this title is the representative of the estate.

(b) The trustee in a case under this title has capacity to sue and be sued.

§ 343. **Examination of the debtor**

The debtor shall appear and submit to examination under oath at the meeting of creditors under section 341(a) of this title. Creditors, any indenture trustee, or any trustee or examine in the case may examiner[1] the debtor.

§ 521. **Debtor's duties**

The debtor shall—

(1) file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, and a statement of the debtor's financial affairs;

(2) if a trustee is serving in the case, cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties under this title;

(3) if a trustee is serving in the case, surrender to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relating to property of the estate; and

(4) appear at the hearing required under section 524(d) of this title.

§ 541. **Property of the estate**

(a) The commencement of a case under section 301, 302, or 303 of this title creates an es-

---

[1] So in original. Probably should be "examine."

tate. Such estate is comprised of all the following property, whereever located:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) An interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, and profits of or from property of the estate, except such as are earnings from services per-

formed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

* * * * *

§ 701. **Interim trustee**

(a) Promptly after the order for relief under this chapter, the court shall appoint one disinterested person that is a member of the panel of private trustees established under section 604(f) of title 28 or that was serving as trustee in the case immediately before the order for relief under this chapter to serve as interim trustee in the case.

(b) The service of an interim trustee under this section terminates when a trustee elected or designated under section 702 of this title to serve as trustee in the case qualifies under section 322 of this title.

(c) An interim trustee serving under this section is a trustee in a case under this title.

§ 702. **Election of trustee**

(a) A creditor may vote for a candidate for trustee only if such creditor—

(1) holds an allowable, undisputed, fixed, liquidated, unsecured claim of a kind entitled to distribution under section 726(a)(2), 726(a)(3), 726(a)(4), 752(a), 766(h), or 766(i) of this title;

(2) does not have an interest materially adverse, other than an equity interest that is not substantial in relation to such creditor's interest as creditor, to the interest of creditors entitled to such distribution; and

(3) is not an insider.

(b) At the meeting of creditors under section 341 of this title, creditors may elect one person

to serve as trustee in the case if election of a trustee is requested by creditors that may vote under subsection (a) of this section, and that hold at least 20 percent in amount of the claims specified in subsection (a)(1) of this section that are held by creditors that may vote under subsection (a) of this section.

(c) A candidate for trustee is elected trustee if—

(1) creditors holding at least 20 percent in amount of the claims specified in subsection (a)(1) of this section that are held by creditors that may vote under subsection (a) of this section vote; and

(2) such candidate receives the votes of creditors holding a majority in amount of claims specified in subsection (a)(1) of this section that are held by creditors that vote for trustee.

(d) If a trustee is not elected under subsection (c) of this section, then the interim trustee shall serve as trustee in the case.

§ 704. Duties of trustee

The trustee shall—

(1) collect and reduce to money the property of the estate for which such trustee serves, and close up such estate as expeditiously as is compatible with the best interests of parties in interests;

(2) be accountable for all property received;

(3) investigate the financial affairs of the debtor;

(4) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper;

(5) if advisable, oppose the discharge of the debtor;

(6) unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest;

(7) if the business of the debtor is authorized to be operated, file with the court and with any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the court requires; and

(8) make a final report and file a final account of the administration of the estate with the court.

§ 721. Authorization to operate business

The court may authorize the trustee to operate the business of the debtor for a limited period, if such operation is in the best interest of the estate and consistent with the orderly liquidation of the estate.

SUBCHAPTER IV—COMMODITY BROKER LIQUIDIATION

§ 761. Definitions for this subchapter

In this subchapter—

(1) "Act" means Commodity Exchange Act (7 U.S.C. 1 et seq.);

(2) "clearing organization" means organization that clears commodity contracts made on, or subject to the rules of, a contract market or board of trade;

(3) "Commission" means Commodity Futures Trading Commission;

(4) "commodity contract" means—

(A) with respect to a futures commission merchant, contract for the purchase or sale of a commodity for future delivery on, or

subject to the rules of, a contract market or board of trade;

(B) with respect to a foreign futures commission merchant, foreign future;

(C) with respect to a leverage transaction merchant, leverage transaction;

(D) with respect to a clearing organization, contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization, or commodity option traded on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization;

(E) with respect to a commodity options dealer, commodity option;

(5) "commodity option" means agreement or transaction subject to regulation under section 4c(b) of the Act (7 U.S.C. 6c(b));

(6) "commodity options dealer" means person that extends credit to, or that accepts cash, a security, or other property from, a customer of such person for the purchase or sale of an interest in a commodity option;

(7) "contract market" means board of trade designated as a contract market by the Commission under the Act:

(8) "contract of sale", "commodity", "future delivery", "board of trade", and "futures commission merchant" have the meanings assigned to those terms in the Act;

(9) "customer" means—

(A) with respect to a futures commission merchant—

(i) entity for or with whom such futures commission merchant deals and that holds a claim against such futures commission merchant on account of a commodity contract made, received, acquired, or held by or

through such futures commission merchant in the ordinary course of such futures commission merchant's business as a futures commission merchant from or for the commodity futures account of such entity; or

(ii) entity that holds a claim against such futures commission merchant arising out of—

(I) the making, liquidation or change in the value of a commodity contract of a kind specified in clause (i) of this subparagraph;

(II) a deposit or payment of cash, a security, or other property with such futures commission merchant for the purpose of making or margining such a commodity contract; or

(III) the making or taking of delivery on such a commodity contract;

* * * * *

§ 762. Notice to the Commission and right to be heard

(a) The clerk shall give the notice required by section 342 of this title to the Commission.

(b) The Commission may raise and may appear and be heard on any issue in a case under this chapter.

§ 763. Treatment of accounts

(a) Accounts held by a particular customer in separate capacities shall be deemed to be accounts of separate customers.

(b) A member of a clearing organization shall be deemed to hold such member's proprietary account in a separate capacity from such member's customers' account.

(c) The net equity in a customer's account may not be offset against the net equity in the account of any other customer.

§ 764. Voidable transfers

(a) Except as otherwise provided in this section, any transfer of property that, but for such transfer, would have been customer property, may be avoided by the trustee, and such property shall be treated as customer property, if and to the extent that the trustee avoids such transfer under section 544, 545, 547, 548, 549, or 724(a) of this title. For the purpose of such sections, the property so transferred shall be deemed to have been property of the debtor, and, if such transfer was made to a customer or for a customer's benefit, such customer shall be deemed, for the purposes of this section, to have been a creditor.

(b) Notwithstanding sections 544, 545, 547, 548, 549 and 724(a) of this title, the trustee may not avoid a transfer made before five days after the order for relief, if such transfer is approved by the Commission by rule or order, either before or after such transfer, and if such transfer is—

(1) a transfer of a commodity contract entered into or carried by or through the debtor on behalf of a customer, and of any cash, securities, or other property margining or securing such commodity contract; or

(2) the liquidation of a commodity contract entered into or carried by or through the debtor on behalf of a customer.

§ 765. Customer instruction

(a) The notice under section 342 of this title to customers shall instruct each customer—

(1) to file a proof of such customer's claim promptly, and to specify in such claim any specifically identifiable security, property, or commodity contract; and

(2) to instruct the trustee of such customer's desired disposition, including transfer under section 766 of this title or liquidation, of any commodity contract specifically identified to such customer.

(b) The trustee shall comply, to the extent practicable, with any instructions received from a customer regarding such customer's desired disposition of any commodity contract specifically identified to such customer. If the trustee has transferred, under section 766 of this title, such a commodity contract, the trustee shall transmit any such instruction to the commodity broker to whom such commodity contract was so transferred.

§ 766. Treatment of customer property

(a) The trustee shall answer all margin calls with respect to a specifically identifiable commodity contract of a customer until such time as the trustee returns or transfers such commodity contract, but the trustee may not make a margin payment that has the effect of a distribution to such customer of more than that to which such customer is entitled under subsection (h) or (i) of this section.

(b) The trustee shall prevent any open commodity contract from remaining open after the last day of trading in such commodity contract, or into the first day on which notice of intent to deliver on such commodity contract may be tendered, whichever occurs first. With respect to any commodity contract that has remained open after the last day of trading in such commodity contract or with respect to which delivery must be made or accepted under the rules of the contract market on which such commodity contract was made, the trustee may operate the business of the debtor for the purpose of—

(1) accepting or making tender notice of intent to deliver the physical commodity underlying such commodity contract;

(2) facilitating delivery of such commodity; or

(3) disposing of such commodity if a party to such commodity contract defaults.

* * * * *

§ 1104. **Appointment of trustee or examiner**

(a) At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest, and after notice and a hearing, the court shall order the appointment of a trustee—

(1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or

(2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.

(b) If the court does not order the appointment of a trustee under this section, then at any time before the confirmation of a plan, on request of a party in interest, and after notice and a hearing, the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by

current or former management of the debtor, if—

(1) such appointment is in the interests of creditors, and equity security holders, and other interests of the estate; or

(2) the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed $5,000,000.

(c) If the court orders the appointment of a trustee or an examiner, if a trustee or an examiner dies or resigns during the case or is removed under section 324 of this title, or if a trustee fails to qualify under section 322 of this title, then the court shall appoint one disinterested person to serve as trustee or examiner, as the case may be, in the case.

§ 1107. **Rights, powers, and duties of debtor in possession**

(a) Subject to any limitations on a trustee under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.

(b) Notwithstanding section 327(a) of this title, a person is not disqualified for employment under section 327 of this title by a debtor in possession solely because of such person's employment by or representation of the debtor before the commencement of the case.

§ 1108. **Authorization to operate business**

Unless the court orders otherwise, the trustee may operate the debtor's business.

§ 15701. Interim trustee

(a) Promptly after the order for relief under chapter 7 of this title, the United States trustee shall appoint one disinterested person that is a member of the panel of private trustee[1] established under section 568(a)(1) of title 28 or that was serving as trustee in the case immediately before the order for relief under this chapter to serve as interim trustee in the case.

(b) If none of such persons is willing to serve as interim trustee in the case, then the United States trustee shall serve as interim trustee in the case.

(2)

No. 84-261

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

COMMODITY FUTURES TRADING COMMISSION,

PETITIONER

v.

GARY WEINTRAUB, ET AL.

BRIEF OF JOHN K. NOTZ, JR., TRUSTEE, AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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11pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 84-261

IN THE

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OCTOBER TERM, 1984

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BRIEF OF JOHN K. NOTZ, JR., TRUSTEE, AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STATEMENT OF INTEREST

The issue presented in this case is whether a Chapter 7 trustee of a corporation which is a debtor in a bankruptcy liquidation proceeding has the power to claim or waive that debtor's pre-petition attorney-client privilege. John K. Notz, Jr. is the Trustee for the debtor, Chicago Discount Commodity Brokers, Inc. ("CDCB"), and it is his waiver of the debtor's pre-petition attorney-client privilege that is at issue here.

The decision below has had a significant impact on the Trustee's ability to discharge his duties to the estate, and will have a similar impact on other private trustees for

corporate debtors. The Trustee is personally familiar with the facts surrounding the waiver at issue here and the general administration of the CDCB estate. Both the Solicitor General and the Respondents have consented to the filing of this brief, and their written consent is on file with the Clerk of this Court.

STATEMENT OF FACTS

Because the Solicitor General has adequately set forth the factual background of this case, the Trustee will not expand on that statement, but will concentrate on the practical reasons why a writ of certiorari should be granted in this case.

REASONS FOR GRANTING THE PETITION

A. The Decision Below Will Substantially Impair A Chapter 7 Trustee's Ability To Fulfill His Statutory Duties And Will Cause Increased Delay And Expense In Bankruptcy Proceedings

A trustee under Chapter 7 of the Bankruptcy Code (the "Code") is required to collect and reduce to money the assets of the estate and to close up the estate as expeditiously as is compatible with the best interests of parties in interest. 11 U.S.C. § 704. Because the property of the estate includes causes of action which belong to the debtor when the petition is filed, 11 U.S.C. § 541; 4 *Collier On Bankruptcy*, ¶541.10 (15th Ed. 1984), the trustee is required to investigate and prosecute these actions for the benefit of the estate. The Seventh Circuit's holding that the Trustee does not have the right to control the assertion or waiver of the debtor's pre-petition attorney-client privilege has inhibited the Trustee's ability to fulfill these duties.

The value of the right to control the assertion or waiver of the privilege is graphically illustrated here. The Trustee has filed more than seventy-five separate adversary proceedings seeking to recover a total amount of more than $6,000,000. *See*

Appendix to Brief of John K. Notz, Jr., Trustee, as Amicus Curiae, pp. 1-4 [hereinafter cited as Amicus Appendix]. The Trustee sought to depose Mr. Weintraub on November 17, 1981, and on December 16, 1981, as part of his investigation into potential claims. At this deposition the Trustee attempted to elicit information about certain persons against whom the Trustee later filed adversary proceedings, but Weintraub refused to answer on the grounds of attorney-client privilege. Amicus Appendix, pp 5-41. Weintraub also refused to produce documents under a claim of attorney-client privilege and generally thwarted the Trustee's attempts to learn about the day to day operations of the debtor. As a result, the Trustee's accountants and attorneys were forced, at the expense of the estate, to reconstruct the operations of CDCB in order to learn what Weintraub refused to tell.

The Trustee's still pending adversary proceeding against Frank McGhee, Goodman-Manaster and Company, Inc., and Thomas Suba is an example of the possible value of the right to control the attorney-client privilege. In that case the Trustee sought $3,119,576.25 in damages, alleging, *inter alia*, that the defendants violated various provisions of the Commodity Exchange Act in a scheme to use customer funds as margin for Frank McGhee's personal trading account at Goodman-Manaster. The Trustee has settled with Frank McGhee[1] and obtained a default judgment against Thomas Suba, but the remaining claims against Goodman-Manaster for $1,361,285.64 are presently pending.

This adversary proceeding began with a one count complaint for approximately $440,000 against Frank McGhee, filed in November, 1980. The claim against Goodman-Manaster was not filed until November 4, 1982. Mr. Weintraub and other CDCB pre-petition counsel may have had

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[1] See Settlement Agreement with Frank McGhee, Amicus Appendix at 63, which provides that Frank McGhee agrees to cooperate with, disclose to, and submit to examination by the Trustee. *Id.* at 68.

information relevant to this claim, but they have refused to give the Trustee this information. The Trustee has been forced to spend considerable sums in lawyers' and accountants' fees in investigating this action without pre-petition information obtained from the debtor's counsel. Moreover, if the Court of Appeals' ruling stands, the Trustee may never know if he discovered all of the pertinent facts.

Although the Trustee was frustrated by Mr. Weintraub's refusal to testify, the Trustee was greatly aided in his investigation by materials discovered in the files of other CDCB attorneys. One of the documents first found in these files was a cross-collateralization agreement among CDCB's officers, directors and shareholders. The Trustee has relied on this document to prosecute actions and deny claims of CDCB insiders. See items 7 and 8 of Appendix A. Under the ruling of the Court of Appeals, future trustees might be denied access to similar materials.

This Trustee's experience amply illustrates the value of the right to control the waiver or assertion of the debtor's pre-petition attorney-client privilege. If a trustee is to perform his duties under the Code efficiently, he must have this right. The Court of Appeals' ruling will have the practical effect of ensuring that all future trustees are as handicapped as this Trustee has been handicapped in his ability to investigate and prosecute actions, particularly actions against insiders of the debtor.

B. The Holding Below Would Allow Dishonest Management To Protect Itself From Personal Liability To The Estate

Under the ruling below, management which knew it was guilty of improper and actionable conduct could seal off a major source of evidence, and the trustee would not be able to compel testimony from pre-petition counsel regarding their acts.

This case provides a compelling example of the possible abuse inherent in the decision below. All of the parties

asserting the CDCB's attorney-client privilege (defendant Weintraub and intervenors Frank and Andrew McGhee) and all other CDCB "insiders" who benefit from their assertion of the privilege have or had substantial potential personal liability to the estate aggregating over $4,000,000 as described in Appendix A. The potential liability of insiders to the estate shows both the great value to the estate of control over the assertion or waiver of the privilege and the potential abuse when this control is given to former management.

Those who would benefit from the assertion of the privilege, such as the CDCB insiders here, use the debtor corporation's privilege to protect themselves as individuals, not to protect the corporation. The conflict between their interests and the Trustee's interests arises from their own culpable acts and omissions, not from any preference by the Trustee of creditors over shareholders. The Trustee represents the entire estate, 11 U.S.C. § 323(a), and as such must act in the best interests of the entire estate. *Citibank, N.A.* v. *Andros*, 666 F.2d 1192, 1194 (8th Cir. 1981). It is in the best interest of the estate that the Trustee, as representative of the entire estate—and not former management who seek to avoid additional personal liability—control the debtor's attorney-client privilege.

C. The Decision Below Is Contrary To The Rulings Of Other Courts

As the Solicitor General pointed out in his brief, the decision of the Court of Appeals conflicts with the decisions in several circuits.[2] Furthermore, the ruling below is contrary to rulings on the attorney-client privilege in other

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[2]Compare the decision below with *Citibank, N.A.* v. *Andros*, 666 F.2d 1192 (8th Cir. 1981); *In re O.P.M. Leasing Services, Inc.*, 670 F.2d 383 (2d Cir. 1982); and *In re Boileau*, 736 F.2d 503 (9th Cir. 1984) petition for reh'g pending (filed July 13, 1984). See discussion in the Petition submitted by the Solicitor General at pp. 5-8.

situations where the natural representatives of legal entities are replaced by other representatives. In *United States* v. *De Lillo*, 448 F. Supp. 840 (E.D.N.Y. 1978), the court found that an almost entirely new Board of Trustees of a pension fund had the power to waive the attorney-client privilege between an attorney and the former Board. Similarly, the courts have held that a corporation may waive the attorney-client privilege against the wishes of the individual officer who made the communication. *E.g.*, *United States* v. *Piccini*, 412 F.2d 591, 593 (2d Cir. 1969); *In re Grand Jury Proceedings*, 434 F. Supp. 648 (E.D.Mich. 1977), aff'd per curiam, 570 F.2d 562 (6th Cir. 1978). Thus, the right to control the attorney-client privilege is an asset of the corporation, not an asset of the particular officers or directors of the corporation. In bankruptcy the corporation's assets are transferred to the estate, and the control of the attorney-client privilege should belong with the Trustee as the representative of the estate.

CONCLUSION

For the reasons stated above, the Trustee requests that the Solicitor General's Petition for Writ of Certiorari be granted.

Respectfully submitted,

JOHN K. NOTZ, JR.
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APPENDIX A

LIST OF POTENTIAL INSIDER LIABILITY

Name and Position	Case	Description
1. Gary Weintraub —inside counsel	No action filed	$100,233.87 deficit balances in trading accounts of Weintraub and his father, Martin Weintraub. Settled by payment to Trustee of $75,000.00. See Amicus Appendix, p. 58.
2. Frank H. McGhee —President and Director but not a Shareholder	80 A 2142	Action to recover $2,034,648.34 deficit balance and other counts.
	82 A 3930	Action to recover $40,000.00 in fraudulent or preferential transfers to his mother, Ellen H. McGhee.
	82 A 3923	Action to recover $651,707.20 for debit balances, fraudulent transfers, conversion and other claims.
	82 A 3925	$2,115.00 claim for fraudulent transfer.
3. Andrew McGhee —Officer, Director, and Shareholder	82 A 0545	Action to recover, debit balances and preference of $768,345.40.
	81 A 1530	Action to recover $125,634.27 in fraudulent transfers. (F. McGhee and Larry Cote also co-defendants).
	80 A 2143	Action to recover $145,504.51 as preferences and fraudulent conveyances.

Name and Position	Case	Description
4. Stanley Berg —Shareholder	82 A 3824	Action to recover property of the estate believed to be in excess of $25,000.
5. Arthur A. Berg —Affiliate of Stanley Berg	82 A 2360	Action to recover fraudulent transfer and debit balances totaling $205,696.13. Berg was involved in financing the purchase of CDCB by the McGhees and Larry Cote.
6. Larry Cote —Vice President, Secretary, Director and Shareholder	82 A 3924	Action to recover preferential transfer of $43,950.
7. Paul Rabrich —Shareholder	Objection to Claim filed November 9, 1982	Objection to customer claim and general claim totaling $30,828.50 on grounds of cross-collateralization agreement first found in one of CDCB's attorney's files.
8. Dr. Wayne B. Tate —Shareholder	82 A 3887	Action to recover debit balance of $14,002.60, and to apply cross-collateralization agreement first found in one of CDCB's attorney's files.
9. Shirley Taetle —Accountant	82 A 3932	Action to recover $14,332.27 deficit balance, which had been reversed by a "phantom" credit.
10. DBD Trust Group and Donna Weiner —Affiliates of auditing firm	82 A 3933 82 A 3935	Actions to recover deficit balances aggregating $63,109.17.

No. 84-261

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

COMMODITY FUTURES TRADING COMMISSION,

Petitioner,

v.

GARY WEINTRAUB, et al.,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a trustee in bankruptcy has the power to assert or waive the bankrupt's attorney-client privilege, with respect to privileged communications antedating the filing of the bankruptcy petition?

2. If so as a general matter, whether a trustee of a corporation in bankruptcy may waive the corporation's attorney-client privilege, with respect to privileged pre-bankruptcy communications, despite the opposition of a stockholder and of the sole director, and despite the corporation's representation by separate counsel approved by the bankruptcy court?

3. If so as a general matter, whether a trustee in bankruptcy may, consistent with his fiduciary obligations, waive his bankrupt's attorney-client privilege, with respect to privileged pre-bankruptcy communications: (i) for the purpose of facilitating a government investigation, (ii) where the government is adverse to the bankrupt and is empowered to seek sanctions, including financial penalties, against the bankrupt, and (iii) blindly, without consideration of the potential impact of disclosure on the bankrupt estate (because, *inter alia*, the trustee is unaware of the contents of the privileged communications to the bankrupt's former attorney which are sought to be disclosed)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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STATEMENT OF THE CASE

This is a proceeding to enforce an administrative subpoena of the Commodity Futures Trading Commission (the "CFTC") with respect to twenty-three questions to which Gary A. Weintraub, an attorney, asserted the attorney-client privilege of his former client and Canon 4, Rule 4-101, of the Illinois Code of Professional Responsibility (79 Ill.2d XXV, XLIV-XLV (1980)).

Mr. Weintraub responded to the subpoena and appeared before CFTC representatives on three days (February 26 and 27, and August 26, 1981). He answered approximately 800 questions. After he testified in the CFTC's investigation of his former client, Chicago Discount Commodity Brokers, Inc. ("CDCB"), the CFTC brought this action to compel Weintraub to answer the disputed questions. Then, as now, CDCB was in bankruptcy.

On March 5, 1982, six months after Mr. Weintraub's last examination, the CFTC requested CDCB's trustee in bankruptcy, John K. Notz, Jr.,* to waive CDCB's attorney-client privilege. On March 11, the trustee responded to the CFTC:

> As Interim Trustee [for CDCB] I hereby waive any interest I have in the attorney-client privilege possessed by that debtor for any communications or information occurring or arising on or before October 27, 1980.
>
> (Docket Item #18; Appendix A, *post*, 1a)

Other than the trustee's waiver letter (in which he acceded to the CFTC's request without limitation or condition, and without explanation), the record is silent as to any reasons for the trustee's waiver, or any "considerations" by him in granting the CFTC's request. (Despite improper and

* On the CFTC's recommendation, Mr. Notz had been appointed as equity receiver of CDCB. (*See*, Case No. 80 C 5755 (U.S.D.C., N.D.Ill.) (Moran, J.), transcript of proceedings, October 27, 1980, attached as Exhibit 1 to the "Provisional Motion of Intervenors for Leave to Supplement the Record" filed in, and granted by, the Seventh Circuit.) Mr. Notz then filed a voluntary petition in bankruptcy (Chapter 7) on behalf of CDCB, and was appointed interim trustee and eventually permanent trustee for CDCB by the bankruptcy court. The bankruptcy court also appointed independent counsel for CDCB as debtor. (Order of November 24, 1980, No. 80 B 14472 (U.S.Bankr.Ct., N.D.Ill.) (Fisher, B.J.).

self-serving efforts by the trustee after-the-fact and *dehors* the record to justify his blanket waiver, the only reason of record for the waiver was the CFTC's request.)*

The matter was argued before a magistrate (Carl B. Sussman), who held (i) that the disputed matters were privileged, and (ii) that Mr. Weintraub had properly asserted the attorney-client privilege, but (iii) nonetheless directed Weintraub to answer the disputed questions on the basis of the subsequent "waiver" by the bankruptcy trustee.

Mr. Weintraub, joined by Respondents Frank H. McGhee, the sole officer and director of the corporation, and Andrew McGhee, a stockholder of the corporation (intervening respondents below), filed objections in the district

* Neither at the time of the "waiver", nor when the trustee's letter was presented to the bankruptcy court, nor in the district court, was any showing made of any reason for the waiver, or that the trustee gave any consideration to the potential effects of the solicited disclosures. On appeal (on petition for rehearing), the CFTC was allowed to supplement the record: no showing of the trustee's reasons or "consideration" was even offered.

In his *amicus* brief to the Seventh Circuit, on rehearing, the trustee for the first time claimed (without even a supporting affidavit) that he had "decided that the best interests of the CDCB estate would be advanced by waiving the privilege" (Brief of John K. Notz, Jr., Trustee, as *Amicus Curiae*, in Support of the Petition of the [CFTC] for Rehearing, with Suggestion that Rehearing Be *En Banc*, at 1 (filed in the Seventh Circuit, February 13, 1984)). The Government now relies on this representation (Petition for Writ of Certiorari, at 3, n1).

The trustee's belated and conclusory representation is contradicted by the fact that he could not possibly evaluate the "interests of the estate" without knowing the contents of the privileged communications (which have never been disclosed to him). Moreover, since the "waiver" was blanket, the potential disclosure was not limited to the twenty-three questions here in issue, but encompassed all privileged matters since CDCB's founding.

court. The CFTC did not appeal from the magistrate's holdings that the privilege applied and had been properly asserted by Weintraub.

The district court (Nicholas J. Bua, J.) initially affirmed, and later clarified* that "Respondent [Weintraub] shall respond to the . . . questions . . . without asserting an attorney-client privilege on behalf of [CDCB]" (Petition for Writ of Certiorari, *App. C*, at 17a, *App. D*, at 17b.))

Respondents McGhee appealed the district court's orders to the Seventh Circuit. Mr. Weintraub did not appeal. The CFTC did not cross-appeal on the issues of the privilege itself or its assertion by Mr. Weintraub. The Seventh Circuit reversed, holding that the trustee could not waive his debtor's privilege under the circumstances presented. (The Court of Appeal's original, unpublished opinion is set out in the Petition for Writ of Certiorari, *App. A*, at 1a.)

The CFTC moved to supplement the record and, joined by several *amici*,** petitioned the Court of Appeals for rehearing and for rehearing *en banc*. The Respondents also requested leave to supplement the record.

The panel allowed the parties to supplement the record, modified its original opinion to reflect the altered record, but adhered to its conclusion and judgment. (The court's

* The magistrate had ordered Weintraub to "respond to the various questions . . . [of the CFTC] without asserting *an* attorney-client privilege" (Order of April 26, 1982; Record Item #25) (emphasis added).

** The Court of Appeals allowed *amicus curiae* briefs, in support of the CFTC's Petition for Rehearing with Suggestion for Rehearing *En Banc*, to be filed by John K. Notz, Jr., CDCB's trustee in bankruptcy, by the United States Trustee for the Northern District of Illinois, by the Department of Justice, and by the Securities and Exchange Commission.

order modifying its original opinion is set out in the Petition for Writ of Certiorari, *App. B*, at 12a-16a; the revised opinion is published at 722 F.2d 338.) Rehearing *en banc* was denied; none of the sitting judges of the Seventh Circuit requested a vote. (Order of April 18, 1984; *see*, Petition for Writ of Certiorari, *App. F*, at 21a-22a.)

The CFTC has now petitioned this Court for a writ of certiorari to review the judgment of the Seventh Circuit in this case.

SUMMARY OF RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondents agree that this case presents an important issue: the sanctity of the attorney-client privilege. The question is whether the attorney-client privilege is contingent on the client's solvency, *i.e.*, whether the privilege is lost as the price of invoking the protection of the Federal bankruptcy laws (or as a penalty of involuntary bankruptcy). This is the threshold issue presented.*

However, if the Court were to reverse the Seventh Circuit and to conclude that bankruptcy results in the devolution, by operation of law, of the client's privilege to his trustee in bankruptcy, then a second set of issues would be reached. These questions concern the propriety of a trustee's waiver of his debtor's attorney-client privilege

* There is no issue whether the privilege applies or was properly asserted in this case. The CFTC did not appeal from express findings below which held both. Those issues are not before the Court.

(as to pre-bankruptcy confidences) in light of his fiduciary obligations. The blind, blanket "waiver" in favor of a government investigation of the debtor in this case presents these concerns in sharp relief, and also threatens disclosure of confidences from years prior to bankruptcy.

The issue of disclosure of attorney-client confidences to outsiders is also far broader than the question of the trustee's own power to pierce his bankrupt's privilege (which is not itself presented here, but is encompassed within the waiver mechanism that is in issue).

These issues are compounded by another question which, while not directly presented in this case, inheres in the principle advocated by the Government. That principle is that the bankrupt's privilege passes to the trustee by operation of the Bankruptcy Code. If that interpretation of the Code were somehow adopted, the resulting bankruptcy rule would not be unique to the attorney-client privilege: it would apply to all of the evidentiary privileges of bankrupts.

A more immediate, but equally sensitive, aspect of this case is the application of the Government's trustee waiver power to individuals as well as to corporations. There is simply no basis in the bankruptcy laws to distinguish between individual and corporate bankrupts. This is virtually conceded by the Government in this Court, although a proposed distinction to this effect was advocated by the CFTC in the Court of Appeals.

In this Court, as below, the Government finds no legislative authority for either transferring the debtor's privilege(s) to his trustee in bankruptcy, or for permitting a trustee "waiver" of such pre-bankruptcy privilege(s), or for allowing the trustee himself to pierce the attorney-client privilege. Whatever else may be said, nothing in

either Congressional enactments or Congressional intent supports the Government's position or provides a basis for the fundamental change in the law which the Government's petition requests this Court to adopt.

The thrust of the Government's position is to attack the attorney-client privilege itself. The arguments advanced, which are hardly novel, distill down to the view that in extreme cases, the justification for disclosure is especially strong. The Government focuses its attack on the corporate privilege and on extreme situations, while disregarding the impact of its anti-privilege rule on routine business insolvencies (including, *inter alia*, sole proprietorships, which implicate an individual's privileges indistinguishably from the "business").

This Court has decisively upheld the corporate attorney-client privilege, and has affirmed the time-honored policies which underlie it. *Upjohn v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 585 (1981). This is not the case in which to reconsider *Upjohn*, or to create an exception in bankruptcy.

If privilege in bankruptcy is to be passed about, or treated differently for people and corporations (or for different privileges), or if limited exceptions are to be made in particular or extreme circumstances, or if special procedures are to be designed when conflicting interests are presented, then it is the Congress and not the Court which ought to create those distinctions and design those procedures.

Despite all of the reexamination and revision of the bankruptcy system by the legislative branch in recent years, the Congress has not done so. It has not authorized the judiciary to do so. The Government's petition is addressed to the wrong forum.

RESPONSE TO THE GOVERNMENT'S REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

1. The Bankruptcy Code.

The Government rests its position as to the power of a trustee to waive his bankrupt's pre-bankruptcy attorney-client privilege upon "the powers accorded a Chapter 7 trustee by the Bankruptcy Code . . ." (Petition for Writ of Certiorari, at 9). The Government then cites a list of Bankruptcy Code provisions which confer specific powers and duties upon trustees. (Petition for Writ of Certiorari, at 9-10.) None of those provisions mentions attorney-client privilege, or deals even peripherally with the subject. As the Seventh Circuit concluded below:

> Although the [Bankruptcy Reform] Act [of 1978] confers broad powers on the trustee, *nowhere* is the trustee given specific authority either to assert or waive a corporate debtor's attorney-client privilege.
>
> 722 F.2d at 342, n8 (emphasis added)

The Government would have the Court read such authority into the Bankruptcy Code. Yet when Congress has addressed the attorney-client privilege in the Code, it has unequivocally reasserted the sanctity of bankrupts' privileges, even as against the trustee in bankruptcy. (Bankruptcy Code, §542(e), 11 U.S.C. 542(e).)* The Government

* Section 542(e) authorizes courts to order debtors' attorneys (and accountants) to turn over "recorded information" to the trustee (only). That provision, however, contains an explicit limitation: "subject to any applicable privilege". The purpose of this statutory remedy was to deprive attorneys and accountants of the leverage

(Footnote continued on following page)

has misdirected its petition, which more appropriately should be addressed to the Congress.

2. Other Congressional Pronouncements.

The Government argues that a bankruptcy trustee is the "proper party to waive or assert the corporate debtors' attorney-client privilege" on the basis of a proposed Federal Rule of Evidence which has been *rejected* by Congress—although the Government does not mention the Congressional rejection (Petition for Writ of Certiorari, at 11, citing proposed Fed.R.Evid. 503(c), 56 F.R.D. 183, 236 (1972)). It is anomalous for the Government to rely on a congressionally-rejected change in the law as support for an interpretation of another congressional statute.

Congress has explicitly reserved to itself the power to approve evidentiary rule changes "creating, abolishing, or modifying a privilege" (28 U.S.C. 2076). The interpretation of the Bankruptcy Code sought by the Government in this case would accomplish indirectly what Congress has explicitly prohibited.

In any event, the Government's reliance on rejected Rule 503(c) is puzzling, since that proposed rule dealt only with the question of who may *claim* the privilege, and did not address the power to waive privilege.

* *continued*
they previously had under state lien laws to secure payment before other creditors (by withholding unprivileged documents) from the trustee. (*See*, House Rept. No. 95-595, 95th Cong., 1st Sess. 369-370 (1977); Senate Rept. No. 95-989, 95th Cong., 2d Sess. 84 (1978).)

3. The Caselaw.

The Government argues that the "decision below directly conflicts with the decision of the Eighth Circuit in *Citibank, N.A. v. Andros,*" 666 F.2d 1192 (8th Cir. 1981), and "also conflicts with the result in *In re O.P.M. Leasing Services, Inc.,*" 670 F.2d 383 (2d Cir. 1982). (Petition for Writ of Certiorari, at 5-7.)

In *Citibank*, the seminal decision among the federal circuits, the Eighth Circuit concluded:

> Because the right to decide whether to waive a corporation's attorney-client privilege belongs to management, the right to assert or waive that privilege *passes with the property* of the corporate debtor to the trustee.
>
> 666 F.2d at 1195 (emphasis added)

The *Citibank* panel could cite no specific provision of the [former] Bankruptcy Act of 1898 to support that conclusion.

In *O.P.M.*, decided a month later, the Second Circuit noted the *Citibank* decision (670 F.2d at 386, n2), but found it "unnecessary to accept" the "emphasis on property concepts" and instead narrowly held:

> We hold simply that, as codified in [New York statute], management of a corporation is a function vested in a board of directors, which function may be delegated only to corporate officers. Shareholders have no power to do anything except to elect the members of the board. We hold that in this situation the power to make such a decision as is encompassed by assertion or waiver of the important attorney-client privilege adheres to the trustee *by virtue of the nonexistence of any other entity authorized to so act.*
>
> 670 F.2d at 387 (emphasis added)

As the *Citibank* panel could find no support in the former Act, no specific provision of the Bankruptcy Code was cited in support of the *O.P.M.* panel's conclusion.

In the Ninth Circuit decision cited by the Government, *In re Boileau*, 736 F.2d 503 (9th Cir. 1984), the court followed *O.P.M.* and similarly limited its holding to the "distinctive" facts before it (*id.*, at 506). The issue was the authority of a court-appointed examiner to waive Mr. Boileau's attorney-client privilege. Noting the examiner's "expanded powers" by virtue of his appointment "by stipulation of the parties, to avoid . . . a trustee", the *Boileau* court emphasized:

> Our holding is not to be understood as a ruling on the authority of an examiner to waive the attorney-client privilege. We simply hold that under the particular facts of this case the waiver authority resided in the examiner. *cf. In re O.P.M. Leasing Services, Inc.* [citation omitted] (trustee had authority to waive privilege under peculiar facts of case).
>
> *Ibid.*

None of those decisions, it is submitted, made a thorough analysis of the bankruptcy statutes, or gave consideration to the impact on attorney-client privilege of a general trustee waiver power such as the Government seeks to validate in this case. Only *Citibank*, decided under the former Bankruptcy Act, even purports to be a ruling of general effect.

Citibank relied primarily on the general principle of the former Act that the trustee is vested with his bankrupt's title to property (*compare*, however, Bankruptcy Act of 1898, as amended, §110(a)(3), 11 U.S.C. §110(a)(3) (1976), *with* Bankruptcy Code of 1978, §323, 11 U.S.C. §323 (1984)). No circuit has held that the present Bankruptcy Code grants bankruptcy trustees general control of their debtors' privileges.

The Eighth Circuit's *Citibank* decision is of dubious authority under current bankruptcy law.* The two subsequent decisions (of the Second Circuit in *O.P.M.* and of the Ninth Circuit in *Boileau*) are both limited to their unique facts and do not conflict with the Seventh Circuit's holding in this case. The posture of the caselaw does not, therefore, present a conflict which requires the intervention of this Court at this time.

4. The Government's abandonment of the individual-corporate distinction advanced below.

The Government seemingly abandons the distinction between corporations and individuals which the CFTC advocated below:

> . . . the attorney-client privilege in the corporate context is different because a corporation is not an individual but "an artificial creature of law," *Upjohn v. United States*, 449 U.S. 389-390, and functions entirely differently from individuals.
>
> * * *
>
> The panel's concern in this regard overlooked *a significant difference between corporations and individuals* that vitiates any chilling effect . . . .
>
> Amended Petition of the [CFTC] for Rehearing with Suggestion that Rehearing Be *En Banc*, at 8 (filed with the Seventh Circuit) (emphasis added)

* To support its conclusion in *Citibank*, which relied principally on the property analysis under the former Act, the Eighth Circuit panel also resorted to rejected Federal Rule of Evidence 503(c) (666 F.2d at 1195), discussed *ante*, Point 2. That panel nonetheless recognized that when Congress addressed the subject of attorney-client privilege in the bankruptcy laws, its intent was not to alter the underlying "legal concepts that govern the attorney-client relationship." (*Ibid.*, discussing 11 U.S.C. 542(e); *see*, Point 1, *ante*.)

As to this suggested distinction, the Seventh Circuit noted:

> There is little authority to support the position that the *individual* debtor's attorney-client privilege passes to the trustee in bankruptcy.
>
> 722 F.2d at 342 (emphasis added)

and correctly concluded:

> We perceive no reason to afford a corporate debtor less protection than that afforded an individual debtor in bankruptcy.
>
> *Id.*, at 343

noting *In re Smith*, 24 B.R. 3 (Bankr. S.D. Fla. 1982), in which a trustee's waiver of a bankrupt *individual's* attorney-client privilege was allowed. The Government again cites *Smith* (Petition for Writ of Certiorari, at 6, n5), although it seemingly no longer urges the corporate-individual distinction advocated below by the CFTC, a distinction which does not derive from Congress and finds no support in the Bankruptcy Code.

The *Smith* result, in any event, is not unique. Other federal courts have also permitted third-party waivers of individuals' as well as corporations' privileges in bankruptcy. The Ninth Circuit did so in *Boileau, supra*, which involved a sole proprietor's bankruptcy; and at least one district court has done so (*In re Grand Jury Proceedings*, Grand Jury No. 84-21 (S.D. Cal., June 5, 1984) (unreported to date)).

This Court has upheld the applicability of the attorney-client privilege to corporations as well as to individuals. *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 585 (1981). The occurrence of bankruptcy provides no basis for drawing a fundamental distinction between them.

5. The Government's abandonment of the 7-11 distinction argued below (liquidation v. reorganization).

The Government apparently renounces the other proposed distinction which the CFTC advocated below:

> The panel's distinction misapprehended the significant legal differences between a Chapter 11 corporate reorganization, as existed in *OPM Leasing*, and a Chapter 7 corporate liquidation as exists in this case.
>
> Amended Petition of the [CFTC] for Rehearing with Suggestion that Rehearing Be *En Banc*, at 3 (filed in the Seventh Circuit)

The Government now takes the position that:

> . . . when a trustee is appointed under Chapter 11, he should have the power to waive or assert the debtor corporation's attorney-client privilege for reasons analogous to those under Chapter 7.
>
> Petition for Writ of Certiorari, at 11, n12

To adhere to the 7-11 distinction advocated below would require the Government to concede that *In Re O.P.M. Leasing Services, Inc.*, 670 F.2d 383 (2d Cir. 1982), a *Chapter 11* case, was either (i) wrongly decided, or (ii) an isolated decision uniquely limited to its facts (non-existence of both boards of directors and officers).

6. The Government's anti-privilege arguments.

The Government's policy attack on the attorney-client privilege and its availability in this case renews the usual contentions that are always advanced by those seeking to erode privilege. The Seventh Circuit categorically rejected this attack:

> The assumption underlying the privilege is that "the benefits derived from encouraging communications outweigh the costs of keeping information from other parties." [citation omitted.]
>
> 722 F.2d at 340

This Court has also reaffirmed the underlying purpose of the attorney-client privilege. *E.g., Upjohn Co. v. United States, supra.* That purpose would be undermined, if not obliterated, if the Government's position were the law.

Conditioning the vitality of the privilege on the avoidance of (future) bankruptcy would chill attorney-client confidences. That is the predictable impact of the knowledge that confidential communications to an attorney could later be forcibly disclosed at the option of a trustee, whose primary loyalty lies to creditors (and who is effectively selected by those creditors, *see*, 11 U.S.C. §702).* Ironically, the chilling effect would be most acute when insolvency looms, a time when legal counsel is particularly important.

The Bankruptcy Code's uniform applicability to both individuals and corporations belies the Government's effort to minimize the impact of bankruptcy trustee waivers of attorney-client confidentiality. Moreover, it is difficult to perceive how the Government's proposed construction of the bankruptcy laws to devolve the bankrupt's privilege to the trustee would apply selectively to this one privilege: if adopted, the principle would apply to all of the debtor's privileges. The Government's request that this Court effect such a wide-reaching and fundamental change in the law, without Congressional sanction, disregards the proper role of the Court.

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* The Second Circuit, in *In re O.P.M. Leasing Services, supra,* noted the bankruptcy judge's observation in *Ross v. Popper*, 9 B.R. 485, 487 (S.D.N.Y. 1980) that bankruptcy trustees "frequently" side with creditors even when contrary to the bankrupt's interests. The Second Circuit panel recognized that the trustee's duties can "place him in conflict with the interests of the debtor". (670 F.2d at 386, n2.)

7. The trustee's own examination powers.

The Government notes that:

> The court of appeals' decision would presumably apply not only to investigations by government agencies, but also to the trustee's own examination of the debtor corporation's counsel.
>
> Petition for Writ of Certiorari, at 12, n15

This, however, has been the law for a hundred years. A trustee in bankruptcy has *no* authority to examine into privileged pre-petition matters of his bankrupt. *In Re O'Donohoe*, 18 Fed.Cas. 587 (Fed.Cas.No. 10,435) (D. Maine 1869); *In Re Krueger*, 14 Fed.Cas. 870 (Fed.Cas.No. 7,942), 2 Lowell 182 (D. Mass. 1872); *In Re Aspinwall*, 2 Fed.Cas. 64 (Fed.Cas.No. 591), 7 Ben. 433 (S.D. N.Y. 1874).

Congress has not altered the bankruptcy laws in this regard.* Significantly, neither the trustee's brief nor the Government's petition provides any authority for the proposition that trustees have the right to pierce the bankrupt's privileges.

The arguments advanced by the trustee in this case, John K. Notz, Jr., in his *amicus* brief to this Court are almost entirely aimed at the ability of bankruptcy trustees to gain access to privileged information of their debtors. He argues the desirability of this Court altering the law to provide such access and to allow him to pierce the privilege. In the historical context of the federal bankruptcy laws, such a basic change in the law should

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* As noted *ante* (Point 1), the only Congressional legislation directly addressing the privilege in the bankruptcy laws reasserted that the attorney-client privilege applies even as against the trustee. (11 U.S.C. §542(e)).

emanate, if at all, from the legislative branch. The need for such change, moreover, is at least inferentially disputed by the lack of litigation over the issue.

Most importantly, however, it must be emphasized that this issue is far narrower than the "waiver" issue presented by this case. Plainly, the trustee's ability to pierce the privilege is subsumed by the much broader waiver doctrine: the trustee can obtain privileged confidences if he can waive the privilege; yet if he waives, those confidences become available to others as well. But the question of the trustee's own access to privileged confidences implicates somewhat different policy considerations than those which apply to the general proposition of blanket disclosure of pre-bankruptcy confidences to the world at large and to the government specifically. The trustee's arguments are misdirected: this is not a case about the *trustee's* right to know; that issue is not presented or before this Court.

8. The duties and loyalties of bankruptcy trustees.

The Government's position disregards the reality that bankruptcy trustees owe their fiduciary duty to the creditors of the bankrupt, and only residuarily to the bankrupt. In corporate bankruptcies, the stockholders' interests (the ultimate corporate interest by any standard) are the trustee's lowest concern. Accordingly, trustees' decisions to assert or waive (their bankrupts') privilege would not be governed by the same considerations (nor would the same weight be accorded to them) as would the bankrupt's own decisions in the same circumstances.

The Government simply presumes that trustees would act in the best interests of the bankrupt: plainly an

untenable assumption.* The trustee's waiver in favor of the Government in this case, as in *In re Grand Jury Proceedings*, *supra*, and the trustee's waiver in favor of a creditor in *Citibank, N.A. v. Andros*, *supra*, are ample evidence, if any is needed. The trustee has appropriate responsibilities, but they can and in many instances will conflict with the bankrupt's interests.

Although privileged matters will occasionally arise in the course of trustees' pursuit of their statutory duties, in the garden-variety bankruptcy case privileged attorney-client communications will ordinarily encompass far broader matters and will involve confidences extending over far greater periods of time than the events pertaining directly to the bankruptcy.

The Government and the trustee understandably emphasize their professed concerns with privileged matters which may—speculatively—relate to illegal activities or to undisclosed assets or claims. That, it is respectfully submitted, is a distortion of the overall picture, and a misrepresentation of the larger issues implicated by this case.

The Government and the trustee argue that if the trustee does not succeed to the debtor's privilege(s), bankruptcy will be utilized as a device for insulating attorney-

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* As the magistrate and the district court observed in *Ross v. Popper*, 9 B.R. 485, 487 (S.D.N.Y. 1980):

> In that context [pre-bankruptcy attorney-client communications], it seems to me almost axiomatic that the beneficiary of such communications is *the bankrupt corporation itself*, whose interests are quite obviously adverse to the interests of the trustee in bankruptcy, representing the general creditors. It therefore seems to me to follow that the only proper person to decide whether there should be a waiver of attorney-client privilege respecting transactions that took place prior to bankruptcy is the bankrupt corporation itself, by its authorized officer or officers.

client confidences. The absence of litigation, until quite recently, over trustee "waivers", as well as the inherent disincentives against bankruptcy, suggest that this is a spurious concern.

But if the Government's position were the law, then a substantial inhibition against seeking the protection of the federal bankruptcy laws would be created. If the bankrupt's privilege(s) pass to a trustee, all prior confidences between the debtor and his or her or its attorney would be insecure and open to disclosure to anyone for any reason or, as here, for no reason at all beyond the solicitation of the government.*

This is not a case which explores the boundaries of the attorney-client privilege, or the scope of a recognized exception to the privilege. It is a case where the privilege itself is challenged, and a novel device for circumventing it—arising only upon bankruptcy—is sought to be estab-

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* The Government points out the supervisory powers of United States Trustees (over private trustees, such as Mr. Notz in this case) and their statutory designation as bankruptcy trustees when a private trustee is not available. (Petition for Writ of Certiorari, at 17, n27.) What the Government does not point out is that U.S. Trustees are themselves part of the government: they are appointed by (and subject to removal by) the Attorney General (28 U.S.C. 581(a), (c)). The trustees that the Government would allow to waive private debtors' attorney-client confidences are subordinates of the nation's chief law enforcement officer. In effect, the Government seeks judicial approval for government waivers of private parties' privileges to itself. Predictably, under this arrangement, what occurred in this case would be the norm rather than a "considered" exception: trustees would hardly ever refuse an investigatory effort to inquire into prior attorney-client confidences. Indeed, the Government concedes this to be the practice now: "voluntary cooperation of trustees with . . . government . . . investigations of prior management—including . . . waiver of the attorney-client privilege—is common." (Petition for Writ of Certiorari, at 16.)

lished. The proffered mechanism is "waiver" and the artifice of transferring the privilege to a bankruptcy trustee. The net effect, of course, is to eliminate the rights of the privileged party, and to make available to the Government privileged information which, but for bankruptcy, would be secure.

The transfer-waiver device asserted by the CFTC should not be judicially engrafted onto the Bankruptcy Code. Only Congress should direct such a consequence of bankruptcy, and it clearly has not done so.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

September, 1984

Respectfully submitted,

DAVID A. EPSTEIN
Attorney for Respondents,
Frank H. McGhee
and Andrew McGhee

JANN, CARROLL, SAIN & DOLIN, LTD.
55 East Monroe Street, Suite 4444
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APPENDIX A

(Letterhead of)
Chicago Discount Commodity Brokers, Inc.
175 West Jackson Blvd.
Chicago, Illinois 60604
(312) 922-5888

March 11, 1982

Constantine J. Gekas, Esq.
4600 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606

Re: *Chicago Discount Commodity Brokers, Inc.*

Dear Mr. Gekas:

I have received your letter dated March 5, 1982 with respect to the attorney/client privilege held by the above-named debtor. As Interim Trustee for this debtor I hereby waive any interest I have in the attorney/client privilege possessed by that debtor for any communications or information occurring or arising on or before October 27, 1980. This waiver specifically does not apply to the relationship between me and my attorneys of Gardner, Carton & Douglas.

Very truly yours,
/s/ John K. Notz, Jr.
Interim Trustee

JKN/do
cc: David F. Heroy

No. 84-261

In the Supreme Court of the United States

OCTOBER TERM, 1984

COMMODITY FUTURES TRADING COMMISSION, PETITIONER

v.

GARY WEINTRAUB, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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TABLE OF AUTHORITIES

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REPLY MEMORANDUM FOR THE PETITIONER

Respondents have not provided any reason why certiorari should not be granted in this case. They recognize (Br. in Opp. 5) the importance of the question presented and, for the most part, seek merely to defend the decision below on the merits.

1. Respondents' attempt (Br. in Opp. 10-12) to distinguish this case from the conflicting decisions of the Second, Eighth and Ninth Circuits is unpersuasive. The court below recognized (Pet. App. 15a-16a) that its decision is in conflict with *Citibank, N.A.* v. *Andros,* 666 F.2d 1192 (8th Cir. 1981), which held that the trustee of a corporation undergoing liquidation may waive the debtor's attorney-client privilege by virtue of his "broad power to manage the affairs of the debtor" and his succession to former management's rights (*id.* at 1195). Although *Citibank* was decided under

the former Bankruptcy Act, the relevant provisions of the current Bankruptcy Code are not materially different.[1] Under both statutes, the trustee has management authority over the bankrupt estate. Accordingly, *Citibank* has, with the exception of the decision below, consistently been followed in cases arising under the present statute. See *In re Boileau*, 736 F.2d 503, 505-506 (9th Cir. 1984); cases cited at Pet. 5-6 n.5.

Respondents' argument (Br. in Opp. 11-12) that the Ninth Circuit's decision in *Boileau*[2] is limited to its "unique facts" is without merit. As the court there made clear (736 F.2d at 506), the only unusual fact presented was that an examiner had been granted by stipulation the management authority over the debtor that would normally reside in the trustee. The court therefore looked to the cases addressing the trustee's authority to waive the attorney-client privilege, and adhered to the majority rule rejected by the court below.[3] The only limitation on its holding was with respect to examiners, who usually possess less authority than trustees (*ibid.*).

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[1]See 2 *Collier on Bankruptcy* para. 323.01, at 323-2 to 323-3 (L. King 15th ed. 1984):

> [S]ection 323(a) [of the current Code] * * * is based on the same reasoning as the provision for the vesting of title in the trustee under Section 70a of the [former] Act with a view toward the effective liquidation of the debtor's property.

The trustee's authority over the bankrupt estate (see 11 U.S.C. 541) is thus for present purposes equivalent to that provided by the title-vesting provisions of the former Act.

[2]We note that, since our petition in this case was filed, the court of appeals has denied a petition for rehearing in *Boileau* (No. 83-6259 (9th Cir. Sept. 27, 1984)).

[3]Indeed, the *Boileau* court cited (736 F.2d at 505) the instant case as directly contrary authority. The cases cited by respondents (Br. in Opp. 16) in support of their position on the merits simply do not address the question of who is the proper party to waive a debtor's attorney-client privilege.

2. Respondents appear to suggest (Br. in Opp. 17-18) that this case turns on the question whether the trustee's waiver was in the best interests of the debtor's estate. But that issue is irrelevant to the question presented, which is whether a trustee has the *power* under the Bankruptcy Code to waive the privilege. Respondents did not raise the question whether the waiver here was justified, nor did the court below reach it. Rather, respondents argued, and the court held, that the trustee lacks the power to waive the privilege whether or not it is in the best interests of the estate. Virtually every other court has held otherwise (see Pet. 5-6 & n.5).[4]

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[4]Respondents also argue (Br. in Opp. 8-9) that the question presented should be resolved by Congress rather than the courts. But 11 U.S.C. 542(e), on which they rely, does not bar the trustee from waiving the debtor's privilege, and its legislative history (cited at Pet. 9 n.8) makes clear that Congress contemplated that the issue would be resolved by the courts. See *Citibank, N.A.*, 666 F.2d at 1195. Similarly, Congress evinced its intent in Rule 501 of the Federal Rules of Evidence that the courts develop and interpret the law with respect to privileges. Although Congress did not adopt proposed Rule 503(c), 56 F.R.D. 183, 236 (1972), which recognized the power of trustees to control the privilege, it did not, as respondents suggest (Br. in Opp. 9), reject the Rule on the merits. Rather, the proposed Rules were rejected in order to allow the courts to continue to develop a federal common law of privileges. *Trammel* v. *United States*, 445 U.S. 40, 47 (1980).

For the foregoing reasons and those presented in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

KENNETH M. RAISLER
General Counel
Commodity Futures Trading Commission

OCTOBER 1984

DOJ-1984-10

No. 84-261 (6)

In the Supreme Court of the United States

OCTOBER TERM, 1984

COMMODITY FUTURES TRADING COMMISSION,
PETITIONER

v.

GARY WEINTRAUB, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE COMMODITY FUTURES TRADING COMMISSION

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49 pp

QUESTION PRESENTED

Whether the trustee of a corporation in bankruptcy has the power to waive (or assert) the debtor corporation's attorney-client privilege with respect to communications that took place before the petition in bankruptcy was filed.

PARTIES TO THE PROCEEDING

Petitioner, the Commodity Futures Trading Commission, applied to enforce an administrative subpoena in the district court and was the appellee in the court of appeals.

Respondent Gary Weintraub, a respondent in the district court, did not appeal from the district court's order.

Respondents Frank H. McGhee and Andrew McGhee intervened as respondents in the district court and were appellants in the court of appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes, regulations and rules:

Miscellaneous: Page

Miscellaneous—Continued: Page

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OPINIONS BELOW

The original opinion of the court of appeals (Pet. App. 1a-11a) is unreported. An order of the court of appeals modifying that opinion (Pet. App. 12a-16a) is also unreported. The opinion of the court of appeals as modified is reported at 722 F.2d 338.

JURISDICTION

The judgment of the court of appeals (Pet. App. 23a-24a) was entered on November 21, 1983. A petition for rehearing was denied on April 18, 1984 (Pet. App. 21a-22a). On July 10, 1984, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including August 16, 1984. The petition was filed on that date and granted

on October 29, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent portions of the Bankruptcy Reform Act of 1978, 11 U.S.C. 101 *et seq.*, are reprinted at Pet. App. 25a-36a.

STATEMENT

1. This case arises out of a formal investigation by the Commodity Futures Trading Commission (CFTC) to determine whether Chicago Discount Commodity Brokers (CDCB) or persons associated with that firm violated the antifraud or other provisions of the Commodity Exchange Act (Act), 7 U.S.C. 1 *et seq.* CDCB was a discount commodity brokerage house registered with the CFTC as a futures commission merchant pursuant to 7 U.S.C. 6d(1). On October 27, 1980, the Commission filed a complaint against CDCB in the United States District Court for the Northern District of Illinois, alleging violations of the Act.[1] The same day, Frank McGhee, acting as sole director and officer of CDCB,[2] entered into a consent decree with the CFTC providing, inter alia, for a freeze on CDCB's assets and the appointment of a receiver (R. Supp.[3] Exh. 1). In the consent

[1] *Commodity Futures Trading Commission* v. *Chicago Discount Commodity Brokers, Inc.*, 80 C 5755 (N.D. Ill.).

[2] On October 21, 1980, respondent Andrew McGhee had resigned as officer and director, and on October 22, 1980, Larry Cote had resigned his positions as Secretary and Vice-President of CDCB (Pet. App. 14a; J.A. 15-16). Respondent Frank McGhee was thus the sole remaining director and officer of CDCB as of October 22, 1980 (Pet. App. 14a; J.A. 17).

[3] "R. Supp." refers to the record supplement proposed by the CFTC and made part of the record by the court of appeals through an order dated January 6, 1984.

decree, Frank McGhee authorized the receiver to file a petition for liquidation of CDCB under Chapter 7 of the Bankruptcy Reform Act of 1978 (Bankruptcy Code). Pet. App. 2a, 14a; J.A. 17; R. Supp. Ex. 1, at 7.

On November 4, 1980, the receiver, John K. Notz, Jr., filed a voluntary petition in bankruptcy on CDCB's behalf, seeking liquidation under Subchapter IV of Chapter 7 of the Bankruptcy Code, 11 U.S.C. 761 *et seq.*[4] See Pet. App. 29a-34a. Notz was appointed interim trustee pursuant to Section 15701[5] of the Bankruptcy Code (Pet. App. 36a) and was later made the permanent trustee pursuant to Section 702 (Pet. App. 2a, 27a). When the bankruptcy petition was filed, the CFTC commenced its formal investigation pursuant to 7 U.S.C. 12(a) and 15.[6]

On January 28, 1981, the Commission served an investigatory subpoena upon CDCB's former counsel, respondent Gary Weintraub, seeking his testimony about matters including suspected fraudulent activi-

[4] *In re Chicago Discount Commodity Brokers, Inc.*, No. 80 B 14472 (Bankr. N.D. Ill. Nov. 4, 1980) Subchapter IV is the only bankruptcy avenue available to a commodity broker. 11 U.S.C. 109(d).

[5] Chapter 15 of the Code (11 U.S.C. 1501 *et seq.*) contains special provisions concerning United States trustees applicable in certain judicial districts, including the Northern District of Illinois. See 11 U.S.C. 1501(7). For purposes of this case, Section 15701 does not differ in relevant respects from Section 701.

[6] The investigation was confidential. Information obtained during its course may not be disclosed to third parties absent Commission authorization. See 17 C.F.R. 11.3. Cf. *SEC* v. *Jerry T. O'Brien, Inc.*, No. 83-751 (June 18, 1984). Certain of the documents in the record of this case were placed under seal by the district court.

ties and misappropriation of customer funds by CDCB's officers and employees. Weintraub appeared for his deposition and responded to certain inquiries, but refused to answer 23 questions on the basis of CDCB's attorney-client privilege. Pet. App. 2a-3a; J.A. 25-32. The questions that Weintraub refused to answer concerned CDCB's pre-bankruptcy affairs, including Weintraub's role in the corporation, the location of the corporation's funds, the identity of persons who deposited corporate funds in Weintraub's personal trading account, the amount of customer equity, personal loans made to corporate officers, and the corporation's policies about access to the corporate safe (*ibid.*).

2. On December 15, 1981, the Commission filed this subpoena enforcement action (pursuant to 7 U.S.C. 15) in the United States District Court for the Northern District of Illinois, to compel Weintraub to answer the questions as to which he had asserted CDCB's privilege (J.A. 33-36). After determining that waiver of the privilege would be in the best interests of the CDCB estate in light of potential claims by the estate against CDCB's former management and others,[7] the trustee in bankruptcy, on March 11, 1982, waived the corporation's attorney-client privilege with respect to any communications that occurred on or before October 27, 1980.[8] Pet. App. 3a;

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[7] See Brief of John K. Notz, Jr., Trustee, as Amicus Curiae In Support of CFTC Petition for Rehearing 1; Brief of John K. Notz, Jr., as Amicus Curiae In Support of Petition for Certiorari 2-5 (Trustee's Pet. Amicus Br.).

[8] The trustee waived CDCB's privilege in response to the Commission's written request. In its letter to the trustee (J.A. 47-48), the Commission outlined its year-long efforts to locate missing customer funds and determine the causes for CDCB's bankruptcy and its belief that the corporate

J.A. 49. On April 26, 1982, a United States magistrate granted the Commission's application for an order compelling Weintraub to answer, on the ground that the trustee had validly waived CDCB's privilege (Pet. App. at 19a-20a).[9] The district court upheld the magistrate's order on June 9, 1982 (*id.* at 18a). Frank and Andrew McGhee were granted leave to intervene on June 30, 1982 (Pet. App. 3a; J.A. 50-51),[10] and argued that the trustee's waiver was inef-

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debtor's privilege was being used to block access to relevant information regarding the debtor's assets and daily business operations. In his capacity as interim trustee for CDCB (see 11 U.S.C. 701), Notz was requested by the Commission to waive the corporation's attorney-client privilege "in the best interests of the creditors of CDCB as well as the corporate debtor" (J.A. 48). Before the CFTC's request, Notz had initiated his own investigation of the debtor's property, affairs and conduct pursuant to 11 U.S.C. 704(4). On November 17 and December 16, 1981, the trustee attempted to depose Weintraub pursuant to Federal Bankruptcy Rule 205(a), seeking information concerning the location of certain corporate property and the activities of certain persons against whom the trustee later filed adversary proceedings; Weintraub asserted the attorney-client privilege in response to Notz's questions. Trustee's Pet. Amicus Br. 3; Brief of John K. Notz, Trustee, As Amicus Curiae In Support of CFTC Petition for Rehearing, App. 1-176. At the time of the CFTC's March 1982 request, Notz had initiated and was pursuing a number of adversary actions on behalf of the CDCB estate, seeking to recover over $3 million of the estate's property that, he alleged, had been fraudulently conveyed to Frank and Andrew McGhee. See *id.* at 8-9; Trustee's Pet. Amicus Br. 5, App. A.

[9] The magistrate made no findings as to the attorney-client privilege that Weintraub had asserted on behalf of the McGhees as individuals (Pet. App. 19a-20a).

[10] The McGhees sought leave to intervene ostensibly for the purpose of asserting their personal attorney-client privi-

fective over their objection as "former management" (R. 49, at 7).[11] On July 27, 1982 the district court clarified its earlier order to provide that Weintraub must respond without asserting CDCB's attorney-client privilege[12] (Pet. App. 17a). The McGhees appealed from the July 27 order.[13]

3. The court of appeals reversed (Pet. App. 1a-16a).[14] The court concluded that a bankruptcy

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leges, asserting that Weintraub had acted as their personal attorney in traffic matters, arbitration proceedings, disciplinary proceedings brought against them by a commodity exchange and the CDCB bankruptcy proceeding. R. 42 ¶ 1, at 2. They did not argue against the trustee's authority to exercise the corporate privilege until their July 19, 1982 reply to the CFTC's response to their motion to vacate or modify the magistrate's order (R. 49, at 7).

[11] The McGhees did not argue that the trustee's waiver was contrary to the best interests of the debtor (R. 49, at 7). In this regard, it should be noted that Frank McGhee was convicted in 1983 of embezzling $3.5 million of CDCB's customer funds in violation of Section 9(a) of the Commodity Exchange Act, 7 U.S.C. 13(a), and sentenced to three years' incarceration. *United States* v. *Frank McGhee*, No. 83 Cr. 262-1 (N.D. Ill. Oct. 7, 1983).

[12] The earlier order had not explicitly limited the waiver of the attorney-client privilege to that asserted on behalf of the corporation (Pet. App. 18a).

[13] Because the district court refused to compel Weintraub to testify pending appeal (Pet. App. 4a n.4), the Commission has not yet obtained answers to the questions at issue. While administrative proceedings have already been initiated against respondents, Weintraub's answers could provide information for additional causes of action, or claims against other persons.

[14] On its own motion, the panel revised its opinion on March 19, 1984 (Pet. App. 12a-16a), but reached the same

trustee does not have the power to waive a corporate debtor's attorney-client privilege with respect to communications that occurred before the filing of the bankruptcy petition (*id.* at 11a). Although it took note of the broad powers accorded a trustee under the Bankruptcy Code, the court concluded that those powers do not include the power to waive or assert the corporate debtor's attorney-client privilege for four reasons: the trustee does not under the Code "replace the corporation * * * [or] succeed to the positions of [its] officers and directors" (*id.* at 9a); waiver by the trustee of a corporate debtor would treat such debtors less favorably than individuals in bankruptcy (*id.* at 9a-10a); waiver by the trustee would discriminate against bankrupt corporations as compared to solvent corporations (*id.* at 10a); and, "most importantly," waiver by the trustee could chill attorney-client communications (*id.* at 10a-11a).

The court of appeals recognized that its decision conflicts with *Citibank, N.A.* v. *Andros*, 666 F.2d 1192 (8th Cir. 1981), which held that the trustee of a corporation undergoing liquidation pursuant to the former Bankruptcy Act, 11 U.S.C. (1976 ed.) 110(a), could waive the debtor's attorney-client privilege, but declined to follow it (Pet. App. 15a-16a). The court also noted that *In re O.P.M. Leasing Services, Inc.*, 670 F.2d 383 (2d Cir. 1982), held that the trustee of a corporation undergoing reorganization pursuant to Chapter 11 of the Bankruptcy Code could waive the corporation's attorney-client privilege, but distinguished it on the ground that the board of directors

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result as it had earlier (*id.* at 1a-11a). The CFTC's petition for rehearing was denied without opinion (*id.* at 21a-22a). The petition had been supported by the Securities and Exchange Commission, the United States Trustee for the Northern District of Illinois, and the trustee for CDCB.

of the corporation there was no longer in existence, while here, Frank McGhee remained an officer and director (Pet. App. 14a-15a).

SUMMARY OF ARGUMENT

Control of a corporation's attorney-client privilege rests with its management. As a function of management, the power to assert or waive the corporate privilege changes when new management is installed. Management's decision to waive or exercise the privilege may not be overruled by individual officers or directors, even with respect to their own communications with corporate counsel.

In the case of a corporate debtor in bankruptcy, it is the trustee who constitutes the management. The trustee represents the estate, is vested with all legal and equitable interests of the debtor, and is authorized to operate its business. The trustee, as an arm of the bankruptcy court, owes a fiduciary duty to all parties in interest, including the corporation's equity holders, to maximize the value of the assets of the estate. The debtor's officers and directors are ousted of all management functions in favor of the trustee.

As the person managing the debtor under the Bankruptcy Code, the trustee is the proper party to assert or waive its attorney-client privilege. Control over the privilege is a necessary incident of the trustee's powers over the debtor's affairs and his duties to interested parties. Corporate bankruptcies are not infrequently associated with possible misconduct on the part of former management; this is particularly true in the case of commodity broker bankruptcies. Causes of action against officers and directors for the losses caused by their misconduct are assets of the estate. Because former corporate counsel may be the best or even the only source of information regarding these

causes of action, it is essential that the trustee have control over the corporation's privilege.

Like the management of a solvent corporation, the bankruptcy trustee may conclude that the corporation's interests would best be served by cooperating with government investigations into the conduct of individual officers and directors. Such cooperation is especially useful in bankruptcy, where the estate's limited assets may make effective investigation by the trustee alone difficult or impossible. When the trustee, acting in the best interests of the estate, elects to waive the attorney-client privilege, he is not acting as a prosecutor or similar entity foreign to the corporation any more than is management of a corporation not in bankruptcy when it waives the privilege. The policy concerns expressed by the court of appeals fail to take account of the operation of the corporate attorney-client privilege outside bankruptcy or of the trustee's role in bankruptcy. Permitting pre-bankruptcy officers and directors to veto the trustee's decisions would allow them to use the privilege to shield their own wrongdoing. Only the trustee, supervised by the court, can be relied upon to act in the best interests of all concerned.

ARGUMENT

THE TRUSTEE OF A CORPORATION IN BANKRUPTCY HAS THE POWER TO ASSERT OR WAIVE THE CORPORATION'S ATTORNEY-CLIENT PRIVILEGE WITH RESPECT TO COMMUNICATIONS THAT TOOK PLACE BEFORE THE PETITION IN BANKRUPTCY WAS FILED

A. Control Of A Corporation's Attorney-Client Privilege Is A Function Of Its Management

The question raised by this case is: who is the proper party to act for a corporation in asserting or waiving *the corporation's* attorney-client privilege

when it is undergoing liquidation pursuant to Chapter 7 of the Bankruptcy Code.[15] A corporation, as an artificial entity, must of course act through persons. It is settled that the power to assert or waive a corporation's attorney-client privilege rests with its management—normally the board of directors—or those authorized by management to assert this power.[16] See, *e.g.*, *In re O.P.M. Leasing Services, Inc.*, 670 F.2d 383, 386 (2d Cir. 1982); *Citibank, N.A.* v. *Andros*, 666 F.2d 1192, 1195 (8th Cir. 1981); *In re Grand Jury Investigation*, 599 F.2d 1224, 1236 (3d Cir. 1979); *Stewart Equipment Co.* v. *Gallo*, 32 N.J. Super. 15, 107 A.2d 527 (Law Div. 1954); Note, *The Lawyer-Client Privilege: Its Application to Corporations, the Role of Ethics, and Its Possible Curtailment*, 56 Nw. U. L. Rev. 235, 243-244 (1961); see also *United States* v. *De Lillo*, 448 F. Supp. 840 (E.D.N.Y. 1978) (board of trustees of pension fund is proper entity to waive privilege, by analogy to corporations); cf. *Garner* v. *Wolfinbarger*, 430 F.2d

[15] The same principles apply, and the same result should obtain, with respect to the trustee of a corporation undergoing reorganization pursuant to Chapter 11. See note 42, *infra*.

[16] State corporation laws generally vest management authority in a corporation's board of directors. *E.g.*, Del. Code Ann. tit. vii, § 141 (1976); N.Y. Bus. Corp. Law § 701 (McKinney Supp. 1983-1984); Ill. Ann. Stat. ch. 32, § 8.05 (Smith-Hurd Supp. 1984-1985). See Model Bus. Corp. Act § 35 (1979). In practice, a large corporation is typically managed by its top officers, but their authority legally derives from that of the board of directors. See Eisenberg, *Legal Models of Management Structure in the Modern Corporation: Officers, Directors, and Accountants*, 63 Calif. L. Rev. 375 (1975). The distinctions generally drawn between officers and directors are not relevant to the question presented in this case.

1093, 1103-1104 (5th Cir. 1970), cert. denied, 401 U.S. 974 (1971) (in derivative action, shareholders may for good cause overcome management's assertion of the privilege). Management's decisions with respect to the privilege, as in all other matters, must be consistent with its fiduciary duty to act in the best interests of the corporation. See generally, *e.g.*, *Dodge* v. *Ford Motor Co.*, 204 Mich. 459, 507, 170 N.W. 668, 684 (1919).

It is also settled that a corporation's privilege may not be asserted by individual directors or officers in their own right. Indeed, a corporation may, over the objection of a director or officer, waive its privilege with respect to his communications to the corporation's attorney. When control of a corporation or similar entity passes to new management, control over the attorney-client privilege passes as well. Accordingly, it is clear that when new management is installed as a result of a takeover, merger, change in shareholder composition, or other business development, the new managers may waive the attorney-client privilege with respect to communications made by former officers and directors. See, *e.g.*, *United States* v. *Bartlett*, 449 F.2d 700, 704 (8th Cir. 1971), cert. denied, 405 U.S. 932 (1972) (chief executive officer); *United States* v. *Piccini*, 412 F.2d 591, 593 (2d Cir. 1969), cert. denied, 397 U.S. 917 (1970) (officer and shareholder); *United States* v. *De Lillo*, 448 F. Supp. at 842; *In re Grand Jury Proceedings*, 434 F. Supp. 648 (E.D. Mich. 1977), aff'd per curiam, 570 F.2d 562 (6th Cir. 1978) (vice-president); *In re Grand Jury Subpoena Duces Tecum*, 391 F. Supp. 1029, 1034 (S.D.N.Y. 1975) (president and chairman of the board); *United States* v. *Koenig*, [1973-1974 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,413 (sum-

mary) (S.D.N.Y. 1974) (president); *In re Crescent Beach Inn, Inc.*, 40 Bankr. 56 (Bankr. Me. 1984).[17]

B. The Trustee Of A Corporate Debtor Succeeds To Its Management Functions

1. When a trustee is appointed in a corporate bankruptcy,[18] management's powers and duties pass

[17] Cf. *Bellis* v. *United States*, 417 U.S. 85 (1974) (partner may not assert his Fifth Amendment privilege over partnership records he holds in a representative capacity); *Joy* v. *North*, 692 F.2d 880, 893 (2d Cir. 1982), cert. denied, 460 U.S. 1051 (1983) (waiver of attorney-client privilege with respect to communications underlying special litigation report used to seek dismissal of shareholder derivative action). See generally *Diversified Industries, Inc.* v. *Meredith*, 572 F.2d 596, 611 n.5 (8th Cir. 1978) (en banc); Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 Yale L.J. 953, 988 (1956); Note, *The Attorney-Client Privilege: A Look at Its Effect on the Corporate Client and the Corporate Executive*, 55 Ind. L.J. 407, 411 (1980).

This rule comports with, although it is broader than and independent of, the principle that the privilege passes to the client's successor in interest. Cf. *NLRB* v. *Bildisco & Bildisco*, No. 82-818 (Feb. 22, 1984), slip op. 13 (debtor in possession is same entity as existed before, but with different powers and duties under the Code than it possessed outside bankruptcy). For example, when a person conveys an interest in property, the grantee receives control over the attorney-client privilege to the extent necessary to realize the granted interest. See, *e.g.*, *Walton* v. *Van Camp*, 283 S.W.2d 493 (Mo. Sup. Ct. 1955); *Buuck* v. *Kruckeberg*, 121 Ind. App. 262, 95 N.E.2d 304 (Ind. Ct. App. 1950); 8 *Wigmore on Evidence* § 2328 (McNaughton rev. 1961).

[18] Corporate business entities are limited to liquidation under Chapter 7, in which a trustee is always appointed (see 11 U.S.C. 701), or reorganization under Chapter 11, in which a trustee may be appointed only in specified circumstances, including fraud by current management (see 11 U.S.C. 1104). Stockbrokers and commodity brokers are limited to Chapter

to the trustee.[19] All corporate property passes to the estate created at the commencement of the case (see 11 U.S.C. 541).[20] "[N]o interests in property of the

7 liquidation. See 11 U.S.C. 109(d); page 19 & note 30, *infra*. (Chapter 11, which consolidates and substantially reframes Chapters X, XI, and XII of the former Bankruptcy Act, contemplates that most reorganizations will be conducted without a trustee, *i.e.*, that the debtor's management will retain control of its business to the same extent as would a trustee. See 11 U.S.C. 1107(a). In a Chapter 13 proceeding, which is designed for individuals and sole proprietorships, the trustee does not operate the debtor's business, and management remains the responsibility of the debtor. 11 U.S.C. 1304(b)). See H.R. Rep. 95-595, 95th Cong., 1st Sess. 118-119 (1977) (House Report).

[19] With respect to the disposition of property, the trustee is supervised more closely by the bankruptcy court than is management of a solvent corporation by its shareholders. See 11 U.S.C. 363(b). Court supervision is intended to ensure that the trustee act in the best interests of the estate; it does not suggest that former management retains control over the debtor's privilege. See Note, *Waiver of the Attorney-Client Privilege by the Trustee in Bankruptcy* (Chicago Note) 23 (forthcoming 51 U. Chi. L. Rev.; a copy of this Note has been provided to the respondents and lodged with the Clerk). Indeed, the availability of such supervision suggests precisely the opposite.

[20] The estate includes "all legal or equitable interests of the debtor in property [with certain enumerated exceptions] as of the commencement of the case" (11 U.S.C. 541(a)(1)). See 4 *Collier on Bankruptcy* ¶ 541.10[8], at 541-67 (15th ed. 1984); House Report 176. The scope of the estate under Section 541 is extremely broad. See House Report 367-369; S. Rep. 95-989, 95th Cong., 2d Sess. 82-83 (1978) (Senate Report). A corporate debtor, unlike individual debtors, may not exclude any of its property from the estate. See 11 U.S.C. 522(b); 3 *Collier on Bankruptcy* ¶ 522.05[3]; cf. *In re SA Auto-Jack, Inc.*, 380 F. Supp. 99, 100 (N.D. Cal. 1974).

estate remain in the debtor." H.R. Rep. 95-595, 95th Cong., 1st Sess. 368 (1977) (House Report). The trustee is the legal representative of the estate (11 U.S.C. 323(a)) and as such succeeds to all causes of action and defenses of the corporation (11 U.S.C. 323(b) and 541).[21] The debtor is required to "surrender to the trustee all property of the estate and any recorded information * * * relating to property of the estate" (11 U.S.C. 521(3)). The trustee is "accountable for all property received" (11 U.S.C. 704(2), 1106(a)(1)). He is directed to investigate the debtor's financial affairs (11 U.S.C. 704(4), 1106(a)(3)). A significant part of this investigation is the trustee's inquiry into the actions of former management:

> One of the most important purposes of an investigation by a trustee is to inquire into the conduct, character and quality of the debtor's management and its associates, to reveal causes of action, if any, against officers, directors or others which might inure to the estate.

See 4 *Collier on Bankruptcy* ¶ 704.07, at 704-17 to 704-18 (15th ed. 1984). The trustee is specifically empowered to sue officers, directors and other insiders to recover fraudulent or preferential transfers of the debtor's property (11 U.S.C. 547(b)(4)(B), 548).[22] His ability to obtain information re-

[21] The trustee has the power to prosecute actions on behalf of the estate without prior court approval. Bankr. R. 6009. See generally *Meyer* v. *Fleming*, 327 U.S. 161, 168 (1946).

[22] The capacity to sue and defend in the name of the corporate debtor, a power only the trustee holds (11 U.S.C. 323, 541), is exclusively a management power. *Sterling Industries, Inc.* v. *Ball Bearing Pen Corp.*, 298 N.Y. 483, 84 N.E.2d 790 (1949). See *United Copper Securities Co.* v. *Amalgamated Copper Co.*, 244 U.S. 261, 263-264 (1917).

The trustee's succession to control over the corporate debtor's property gives him other management powers as well. *Great Western Tel. Co.* v. *Purdy*, 162 U.S. 329, 336 (1896); *In re Newfoundland Syndicate*, 201 F. 917 (3d Cir. 1913) (trustee succeeds to directors' right to make assessments on unpaid shares of the corporation); *In re Pipe Line Oil Co.*, 289 F. 698, 700-701 (6th Cir. 1923) (trustee holds right to enforce liability under state statutes where watered stock has been issued even though no asset was transferred); *Moore* v. *Herrink*, 77 F.2d 96, 97 (4th Cir. 1935) (trustee succeeds to the right of the corporation to treat action of the corporation's board of directors in authorizing a promissory note issued by disqualified directors as a nullity); *Hooper* v. *Mountain States Securities Corp.*, 282 F.2d 195, 206-207 (5th Cir. 1960), cert. denied, 365 U.S. 814 (1961) (trustee has standing to maintain an action for fraud on the corporation in the sale of its own securities).

garding fraudulent or other invalid transactions of the bankrupt's officers and employees is a necessary adjunct of the trustee's statutory duty to facilitate an equitable distribution of the bankrupt's assets. The trustee must therefore be afforded wide latitude in obtaining information regarding the bankrupt's property and financial affairs. *In re Browy*, 527 F.2d 799, 802 (7th Cir. 1976).[23]

When a trustee has been appointed in reorganization, he is empowered to "operate the debtor's busi-

[23] When a debtor undergoing reorganization remains in possession, the investigative function may be carried out by an examiner (11 U.S.C. 1106(b)). See House Report 234 (explaining that appointment of an examiner may be appropriate to provide for an investigation of former management's wrongdoing while permitting new management, rather than a trustee, to operate the business as a debtor in possession).

ness" unless the court orders otherwise (11 U.S.C. 1108). Even in liquidation, where the trustee is directed to reduce the property of the estate to money and "close up [the] estate as expeditiously as is compatible with the best interests of parties in interest" (11 U.S.C. 704(1)), the court "may authorize the trustee to operate the business" (11 U.S.C. 721) if continued operation of the debtor's business for a limited time is desirable. House Report 220-221.[24] The trustee is also authorized by the Code to enter into transactions in the course of operating the debtor's business (11 U.S.C. 363(b) and (c)(1)).[25]

The bankruptcy trustee's fiduciary responsibilities parallel those imposed on the management of a solvent corporation. The trustee has a duty to maximize the value of the estate. 11 U.S.C. 323, 704(1); see, *e.g.*, *In re Washington Group, Inc.*, 476 F. Supp. 246,

[24] When operating the debtor's business under either Chapter 7 or Chapter 11, the trustee may, when authorized by the court, employ professional persons, including accountants and attorneys, to represent or assist him in carrying out his duties (11 U.S.C. 327(a) and (b)). Upon court approval, the trustee may also employ "for a specified special purpose * * * an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed" (11 U.S.C. 327(e)). It would be incongruous to empower the trustee to retain the debtor's counsel while withholding control over the attorney-client privilege.

[25] Section 363(c)(1) provides that the trustee may enter into transactions "in the ordinary course of business" without prior approval by the court, but Section 363(b) requires such approval for the "use, [sale], or lease, other than in the ordinary course of business, [of] property of the estate." See also note 19, *supra*.

250 (M.D.N.C. 1979), aff'd *sub nom. Johnston* v. *Gilbert*, 636 F.2d 1213 (4th Cir. 1980), cert. denied, 452 U.S. 940 (1981). This duty runs not simply to the debtor's creditors, but to all claimants with an interest in the estate, including the corporation's equity holders.[26] See, *e.g.*, *B & L Farms Co.* v. *United States*, 238 F. Supp. 407, 410 (S.D.Fla. 1964), aff'd, 368 F.2d 571 (5th Cir. 1966), cert. denied, 389 U.S. 835 (1967) ("bankruptcy trustees do not represent the creditors alone[;] [t]hey must protect the interests of the bankrupt"); *In re Ducker*, 134 F. 43, 47 (6th Cir. 1905); Baird & Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 U. Chi. L. Rev. 97, 101-109 (1984). See generally *Wolf* v. *Weinstein*, 372 U.S. 633, 649-651 (1963). When the trustee acts to maximize the value of the estate, he acts in the best interests of the debtor's shareholders, who have a claim to any surplus remaining after the distribution of assets to creditors. See generally 11 U.S.C. 507. For these reasons, the trustee's fiduciary duties are analogous to those of the management of a corporation not in bankruptcy. See Note, *Waiver of the Attorney-Client Privilege by the Trustee in Bankruptcy* (Chicago Note) 21 (forthcoming 51 U. Chi. L. Rev.).[27]

[26] Similarly, the management of an insolvent corporation not in bankruptcy owes a duty not just to the equity holders, but to creditors as well. See generally *McCandless* v. *Furlaud*, 296 U.S. 140, 156-157 (1935). The trustee of a corporation in bankruptcy stands in the same position as the corporation's directors when they are permitted to remain in possession: both owe fiduciary obligations to the entire estate, including creditors. See 11 U.S.C. 1107; *Wolf* v. *Weinstein*, 372 U.S. 633, 643, 649 (1963).

[27] See note 19, *supra*.

In sum, a bankruptcy trustee is granted substantially complete management authority over the debtor.[28] See 2 *Collier on Bankruptcy* ¶ 323.01, at 323-2 (15th ed. 1984); 4 *id.* ¶¶ 760.01 *et seq.* Former management's role is limited to turning over the corporation's property to the trustee and to providing certain information to the trustee and creditors (11 U.S.C. 521, 343). Congress contemplated that when a trustee has been appointed, he must be put in control of the business and former management "completely ousted." House Report 220-221.[29]

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[28] The court of appeals' failure to recognize this may be attributable to its confusion of various provisions of the Bankruptcy Code. The court relied almost exclusively on 15A W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 7657 (rev. ed. 1981), in concluding that a corporation "is capable of numerous functions even after the filing of the petition in bankruptcy" (Pet. App. 9a). The cited section of Fletcher's treatise, however, does not deal with the question of who, under present law, has the power to manage a bankrupt entity once a trustee has been appointed. Moreover, the court ignored the importance of the special provisions governing commodity brokers, which completely divest former management of any control over the firm's operations (see pages 19-21, *infra*).

[29] See also House Report 104 (the trustee assumes the "management of the debtor's property and the operation of the debtor's business"); 11 U.S.C. 1105 (trustee's appointment may be terminated by the court and the debtor *restored* "to possession and *management* of the property of the estate, and operation of the debtor's business") (emphasis added). Cf. *Wolf* v. *Weinstein*, 372 U.S. at 651; *Great Western Tel. Co.* v. *Purdy*, 162 U.S. at 336; *Weck* v. *District Court*, 161 Colo. 384, 422 P.2d 46 (1967) (trustee takes the place of and exercises the office of the directors). While these references are to the role of the trustee in reorganization, nothing in the Code or its legislative history suggests that Congress contemplated that a trustee in managing a liquidation would have any less control over the affairs of the debtor. See note 42, *infra*.

2. The trustee's role as manager of the corporate debtor emerges with special clarity in the provisions of the Code (Subchapter IV of Chapter 7) governing commodity broker bankruptcies.[30] These provisions were derived largely from proposals by the Commission and reflect Congress's recognition that special legislation was essential to address the complex problems raised by the liquidation of commodity businesses and to prevent commodity broker bankruptcies from having a "ripple effect" that could threaten the integrity of commodity futures markets. House Report 271-272. See generally *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 357-367 (1982). To protect futures markets,[31] as well as the

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[30] 11 U.S.C. 761-766. Commodity broker bankruptcies may proceed only under Chapter 7 (11 U.S.C. 109(d)) because Congress determined that the special protections it intended to afford commodity customers would not be available in Chapter 11. House Report 319. Like commodity brokers, stockbrokers may not utilize Chapter 11. Rather, they are liquidated either under Subchapter III of Chapter 7 (11 U.S.C. 741 *et seq.*) or, as is most often the case, under the Securities Investors Protection Act of 1970 (SIPA), 15 U.S.C. 78aaa *et seq.* Trustees appointed under SIPA have the same general managerial responsibilities as bankruptcy trustees appointed in commodity broker liquidations. See 15 U.S.C. 78fff-1.

[31] Protection of market stability during a commodity broker insolvency is more difficult in the commodities markets than in other markets. Commodity futures, options, and leverage contracts all have limited duration. In addition, gains and losses on open positions in the futures markets are paid out on a daily basis through variation margin payments. Thus, the trustee of an insolvent commodity broker does not have the luxury of an extended period within which to analyze the debtor's business and determine the best course of action. Delay by the trustee can result in default in making the daily variation margin

customers of insolvent commodity brokers,[32] the Commission was given rulemaking authority, which it has exercised, to regulate the conduct of the debtor's business and its liquidation. 7 U.S.C. 24; 17 C.F.R. Pt. 190; see S. Rep. 95-989, 95th Cong., 2d Sess. 8 (1978) (Senate Report).

Under the statutory and regulatory provisions governing the operation of a bankrupt commodity broker, the firm's officers and directors play no role. Beginning on the day of the order for relief,[33] the trustee is responsible for all management functions, including assessing the shortfall in customer funds,

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payments, or default on delivery, either of which could have a ripple effect that disrupts the entire market. Further, abrupt actions by the trustee could seriously disrupt orderly trading, resulting in substantial losses to the bankrupt, its customers, and other market participants.

Senate Report 8; see also House Report 272.

[32] Congress intended to afford special protection to commodity customers, who, like bank trust depositors, own the funds held with the broker and thus most of the funds at risk in such a firm's bankruptcy. House Report 271-272; Senate Report 9 (commodity customers receive "the highest priority against the bankrupt's estate); see 7 U.S.C. 6d(2); 17 C.F.R. 32.6. The Commission has estimated that more than 90 percent of all claims, both in number and value, against an estate in a commodity broker bankruptcy are customer claims. Statement of Philip Johnson, Chairman, Commodity Futures Trading Commission, before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary 8-13 (July 2, 1981). As of 1980, the average amount of customer-owned funds held by each commodity broker registered as a futures commission merchant was $8.7 million. 46 Fed. Reg. 62864 (1981).

[33] The Commission's rules define "Order for Relief" as the filing of a voluntary bankruptcy petition or the adjudication of bankruptcy in an involuntary case. 17 C.F.R. 190.01(dd).

identifying open commodity contracts that are eligible for transfer, liquidating certain contracts,[34] offsetting those that otherwise would result in deliveries, and making and meeting necessary margin calls. Thereafter, the trustee must, among other things, seek instructions from customers regarding the handling of their accounts, as well as continue to carry out other necessary functions attendant to managing a commodity brokerage house.[35] The trustee must also comply with all provisions of the Commodity Exchange Act and Commission regulations "as if [he] were the debtor." 17 C.F.R. 190.04(a).[36] He owes a fiduciary duty to the firm's customers just as do officers of a commodity broker not in bankruptcy.[37] In all respects, it is the trustee who now manages the debtor corporation.

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[34] If the debtor holds an unusually large position on one side of the market, the trustee may have to extend liquidation over time to avoid market disruption. See, *e.g.*, 17 C.F.R. 190.04(d)(2).

[35] 17 C.F.R. 190.02(b)(2), 190.05. See 17 C.F.R. 190.02(g) (making margin payments and calls); 190.03(a) (operating open accounts); 190.04(b) (computing funded balances for open accounts).

[36] The trustee performs virtually identical functions to those required of any commodity broker out of compliance with the Commission's minimum financial requirements (17 C.F.R. 1.17). Under Commission Rule 1.17(a)(4), such a broker must transfer or liquidate all customer accounts and cease doing business as a broker until the firm is able to demonstrate financial compliance.

[37] See House Report 270; *Gordon* v. *Shearson Hayden Stone, Inc.*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,016, at 23,976 n.16 (1980), aff'd mem. *sub nom. Shearson Loeb Rhoades, Inc.* v. *CFTC*, 673 F.2d 1339 (9th Cir. 1982); *In re Rosenbaum Grain Corp.*, 103 F.2d 656, 661 (7th Cir. 1939).

C. In View Of His Powers And Responsibilities Under The Bankruptcy Code, The Trustee Is The Proper Party To Control The Debtor's Attorney-Client Privilege

The question in this case requires a determination of who, for purposes of assertion or waiver of the corporation's privilege, constitutes the "management" of a corporate debtor in bankruptcy.[38] The issue is not, as the court below suggested (Pet. App. 9a), whether the trustee technically "replace[s] the corporation as an entity" or "succeed[s] to the positions of [its] officers and directors." The question is, rather, who manages the affairs of a corporation in bankruptcy.[39] And the answer is plain: it is the

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[38] Alternatively, the Court could conclude that the trustee may assert or waive the attorney-client privilege because the power to do so is an intangible asset that passes to the trustee under the Bankruptcy Code (11 U.S.C. 521(3), 541, 542, 704). See *Citibank*, 666 F.2d at 1195; *O.P.M. Leasing*, 670 F.2d at 386 n.2; *In re Amjoe, Inc.*, 11 Collier Bankr. Cas. 2d (MB) 45 (M.D. Fla. 1976). Cf. *Ex parte Fuller*, 262 U.S. 91 (1923) (trustee has the authority to disclose the books of a bankrupt partnership over the partners' claims of privilege).

[39] See *In re Boileau*, 736 F.2d 503, 506 (9th Cir. 1984) (although nominally a debtor in possession, a sole director did not control the corporate privilege because by stipulation he had been removed from substantial participation in management of the debtor corporation); cf. *Wolf* v. *Weinstein*, 372 U.S. at 645 (individual's actual function rather than his title is controlling in bankruptcy). The legislative history of the Bankruptcy Code indicates that Congress left the privilege issue to be determined by the courts. See 124 Cong. Rec. 32400 (1978) (remarks of Rep. Edwards); *id.* at 33999 (remarks of Sen. DeConcini). See *Citibank*, 666 F.2d at 1195 n.6. See also Proposed Fed. R. Evid. 503(c), 56 F.R.D. 183, 236 (1972) ("[t]he privilege may be claimed by the * * * trustee, or similar representative of a corporation"). Although the

trustee who exercises all the management powers and responsibilities of the corporate debtor and who must therefore control its attorney-client privilege.[40] The

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Proposed Federal Rules of Evidence were never adopted by Congress, they remain standards that have been cited as authoritative sources of federal common law. *United States* v. *De Lillo*, 448 F. Supp. at 842; *In re Grand Jury Proceedings*, 434 F. Supp. at 650 n.1; 2 Weinstein *Evidence* ¶ 503(c)[01], at 503-66 to 503-68 (1980). See *Trammel* v. *United States*, 445 U.S. 40, 47 (1980) (Congress rejected the proposed rules not on their merits but to leave development of the law of privilege to judicial interpretation). Proposed Rule 503(c), as a source of federal common law, contemplates that the trustee acquires the power to assert or waive the corporation's privilege. *Citibank*, 666 F.2d at 1195; *In re O.P.M. Leasing Services*, 13 Bankr. at 60.

We note that this case does not raise the question of who has the authority to waive an *individual's* attorney-client privilege when he is in bankruptcy. Different considerations arguably may apply to such a situation. See Chicago Note 29-31.

[40] This conclusion is reinforced by the Court's decision in *Butner* v. *United States*, 440 U.S. 48 (1979). See Chicago Note 12-17. In *Butner*, the Court held that the right to rents accruing during the pendency of a bankruptcy proceeding, a question not addressed by the Code itself, should be determined by reference to state law as it applied outside the bankruptcy context. The Court stated:

> Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving "a windfall merely by reason of the happenstance of bankruptcy."

Id. at 55, quoting *Lewis* v. *Manufacturers National Bank*, 364 U.S. 603, 609 (1961). Vesting authority over the attorney-

overwhelming weight of authority agrees that the trustee managing a corporate bankrupt controls the debtor corporation's attorney-client privilege.[41]

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client privilege in the trustee comports with the general rule that the management of a corporation controls its privilege. It also serves the purpose of discouraging forum shopping and preventing arbitrary windfalls: if the management of a failing company could halt effective inquiry into its own misconduct by placing the corporation in bankruptcy and thereby retaining control of the privilege, this would provide a substantial incentive to opt for bankruptcy in order to avoid the possibility that newly installed management outside of bankruptcy might waive the privilege. Chicago Note 14-15.

[41] *In re Boileau*, 736 F.2d at 506; *In re O.P.M. Leasing Services, Inc.*, 670 F.2d 383 (2d Cir. 1982) (reorganization); *Citibank*, 666 F.2d 1195-1196 (liquidation); *Schaeffer* v. *Maxwell Energy Equip. Co.*, No. 82-JM-393 (D. Colo. Oct. 10, 1984); *Fulk* v. *Bagley*, No. C-78-333-WS (M.D.N.C. Dec. 21, 1983), reconsideration denied (Jan. 3, 1984) (Chapter X reorganization under former Bankruptcy Act); *In re Continental Mortgage Investors*, No. 76-593-S (D. Mass. July 31, 1979) (Chapter X reorganization); *In re Investment Bankers, Inc.*, 30 Bankr. 883, 886 (Bankr. D. Colo. 1983) (liquidation under Securities Investor Protection Act); *In re Nat'l Trade Corp.*, 28 Bankr. 872, 874 (Bankr. N.D. Ill. 1983) (reorganization); *In re Featherworks Corp.*, 25 Bankr. 634, 643 (Bankr. E.D. N.Y. 1982), aff'd, 36 Bankr. 460 (E.D.N.Y. 1984); *In re Smith*, 24 Bankr. 3 (Bankr. S.D. Fla. 1982) (liquidatoin); *In re Silvio De Lindegg Ocean Developments, Inc.*, 27 Bankr. 28 (Bankr. S.D. Fla. 1982) (liquidation); *In re Kaleidoscope, Inc.*, 15 Bankr. 232, 239-240 (Bankr. N.D. Ga. 1981), rev'd on other grounds, 25 Bankr. 729 (N.D. Ga. 1982) (Chapter X reorganization); *In re Amjoe, Inc.*, 11 Collier Bankr. Cas. (MB) 45 (Bankr. M.D. Fla. 1976); *Weck* v. *District Court*, 161 Colo. 384, 422 P.2d 46 (1967) (statutory accountant-client privilege). See S. Stone & R. Liebman, *Testimonial Privileges* § 1.19, at 35 & n.152 (1983) ("authorities are in accord that successors or trustees of bankrupt or dissolved corporations

On the other hand, officers and directors of a debtor corporation undergoing liquidation have been deprived of the authority to manage; there is no reason why they should be deemed to continue to possess the authority to act for the corporation with respect to its privilege.[42] If such officers and directors object to a waiver of the privilege, it is solely as individuals. Such objections are ineffective even with respect to their own communications. See pages 11-12, *supra*.

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may assert or waive the privilege"). But see *In re Vantage Petroleum Corp.*, 40 Bankr. 34, 39 (Bankr. E.D.N.Y. 1984) (reorganization); *Ross* v. *Popper*, 9 Bankr. 485 (S.D.N.Y. 1980) (Magis.) (dictum).

[42] A trustee appointed under Chapter 11 should have the power to waive or assert the debtor corporation's attorney-client privilege for reasons identical to those under Chapter 7. See Chicago Note 5-6 n.17. See generally 11 U.S.C. 323, 1106, 1108; 5 *Collier on Bankruptcy*, *supra*, at ¶ 1106.01. By virtue of Section 1106(a)(1), a reorganization trustee is vested with many of the same duties, rights and powers as a liquidation trustee. Under Section 1106(a)(3), a reorganization trustee has the same investigative and reporting responsibilities as does a liquidation trustee under Section 704(4). The only differences between the functions of the trustees arise from the different purposes of the liquidation and reorganization provisions of the Act. Because the goal of reorganization is to keep a going concern in business, a reorganization trustee has more functions associated with the operation of the corporation. Cf. *NLRB* v. *Bildisco & Bildisco*, slip op. 14. But a liquidation trustee is also empowered to operate the bankrupt's business as the court permits (11 U.S.C. 721) and must perform all other duties that would normally be performed by management seeking to recover and maximize the property of the estate for ultimate distribution to creditors and equity security holders. In a commodity broker liquidation, the trustee always has the duty to manage the firm's business. See pages 19-21, *supra*.

There is nothing in the Bankruptcy Code itself or in any other federal law that would suggest a different result. Cf. *NLRB* v. *Bildisco & Bildisco*, No. 82-818 (Feb. 22, 1984), slip op. 8-12 (special nature of collective bargaining agreements under federal law requires their somewhat different treatment in bankruptcy proceedings). To the contrary, the trustee cannot carry out his responsibilities under the Code without access to and control over the corporation's pre-petition communications with counsel. The attorney of a bankrupt corporation is often the best (and sometimes the only) repository of information about the corporation's prior affairs. If trustees cannot control access to this information they will be deprived of a vital tool necessary for effective management of the debtor's business. Because commodity broker bankruptcies are frequently associated with inadequate records (as well as allegations of insider fraud)[43], as in this case,[44] the trustee must have ac-

[43] See, *e.g.*, *In re Premex, Inc.*, No. 84-2734 (Bankr. S.D. Cal. filed June 22, 1984); *In re Auric Equities Corp.*, No. 80-13-10238 (Bankr. S.D.N.Y. filed Feb. 27, 1980); *In re Alan Abrahams & Lloyd Carr & Co.*, No. 78-204-2 (Bankr. D. Mass. filed Feb. 1, 1978). See also *In re Group J. David, Inc.* and *In re J. David Dominelli*, No. 84-00633/634-P-INV-7 (Bankr. S.D. Cal. filed Feb. 13, 1984); *In re J. David Securities*, No. 84-01309-LM7 (Bankr. S.D. Cal. filed Mar. 22, 1984); *In re Financial Partners, Ltd.*, No. 82-B-14-353 (Bankr. N.D. Ill. filed Oct. 22, 1982); *In the Matter of T&D Management Co.*, No. 81-02568 (Bankr. D. Utah filed Aug. 10, 1981); *In re Trending Cycles for Commodities, Inc.*, No. 80-00099-BKC-TCB (Bankr. S.D. Fla. filed Jan. 31, 1980) (fraud); *In re Incomco, Inc.*, No. 80 13 11217 (Bankr. S.D.N.Y. filed Aug. 1, 1980) (records).

[44] See notes 8, 11, *supra*; *In re Frank McGhee, et al.*, CFTC Docket No. 83-4.

cess to other sources of information if he is to be able to operate the debtor's business.[45] In other corporate bankruptcies, including those supervised by United States Trustees (see 11 U.S.C. 1501 *et seq.*), trustees also are regularly confronted with inadequate or missing records coupled with allegations of fraud or preferential dealings by corporate officers, making fulfillment of their duties impossible without access to pre-petition communications with counsel. Accordingly, vesting control of the debtor's attorney-client privilege in anyone other than the trustee—and especially in former management (see pages 28-30, *infra*)—would be inconsistent with the scheme established by Congress in the Bankruptcy Code.

D. The Trustee's Control Over A Debtor Corporation's Attorney-Client Privilege Is Necessary To Facilitate The Discovery And Redress Of Fraud And Other Misconduct By Former Management

1. Decisions with respect to the privilege properly lie with the trustee. This result serves the important policy of preventing officers and directors from abusing the corporation's privilege to shield their own wrongdoing and prevent the effective assertion of valid claims by those injured by their actions. The trustee is a fiduciary independent of prior management.[46] In addition to operating the debtor's busi-

[45] Because of the volatility of commodity futures markets, even in normal circumstances the financial condition of a firm can change dramatically from week to week and thus account statements and other records may not accurately reflect the condition of the firm or its accounts. See 46 Fed. Reg. 62864 (1981).

[46] Directors and officers are "insiders" who may not vote in the election of the trustee (11 U.S.C. 101(25)(B)(i) and (ii), 702(a)(3)).

ness, the trustee must, in seeking to maximize the value of the estate, investigate the conduct of prior management to uncover and assert causes of action against the debtor's officers and directors. Especially where a bankruptcy is precipitated by insider misconduct, such causes of action are important assets of the estate. See generally 11 U.S.C. 704(4), 547, 548. Fulfillment of the trustee's duty to discover these causes of action would often be impossible if former management were allowed to control the corporation's attorney-client privilege.[47] See generally *In re Browy*, 527 F.2d 799, 802 (7th Cir. 1976); Securities and Exchange Commission Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees, Pt. VIII, 109-110 (1938) (SEC Report) (management, because of a conflict of interest, frequently impedes the estate's recovery of assets that management has wrongfully diverted or appropriated).

[47] The court of appeals' decision may go as far as casting doubt on the trustee's ability to obtain information during the course of the trustee's own examination of the debtor corporation's counsel: the claim of privilege has been asserted here against the trustee as well as the Commission. See Trustee's Pet. Amicus Br. 3-4 (examination of Weintraub was undertaken by trustee as well as by the CFTC). See generally, *e.g.*, 11 U.S.C. 542(e) (disclosure of recorded information to trustee is "[s]ubject to any applicable privilege"); *In re O.P.M. Leasing Services, Inc., supra*; *In re Silvio De Lindegg Ocean Developments, Inc., supra*; *In re Vantage Petroleum Corp., supra.* Whatever the arguments with respect to whether it is appropriate in particular circumstances for the trustee to waive the privilege and thus authorize (or make) disclosures to third parties (see pages 34-36 & note 63, *infra*), there is no justification for using the corporation's privilege to withhold information from the trustee himself.

In this very case, respondent Frank McGhee was convicted in 1983 of embezzling $3.5 million in CDCB's customer funds, in violation of Section 9(a) of the Commodity Exchange Act, 7 U.S.C. 13(a), and was sentenced to three years' incarceration. *United States* v. *Frank McGhee*, No. 83 CR 262-1 (N.D. Ill. Oct. 7, 1983). Further, both respondents have actual or potential personal liability to the CDCB estate exceeding $4 million. Trustee's Pet. Amicus Br. 8. Respondents consequently have an obvious conflict of interest with respect to whether the corporation's attorney-client privilege should be exercised.[48] Cf. *Pepper* v. *Litton*, 308 U.S. 295, 306 (1939).[49] Allowing the very insiders who may have defrauded the corporation to veto the trustee's waiver of the privilege would prejudice the interests of the debtor and its creditors and customers, and would defeat the privilege's purpose of "promot[ing] broader public interests in the observance of law and administration of justice" (*Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981)). Officers and directors who no longer manage the corporation cannot

[48] Accordingly, even if the trustee would not otherwise have the power to waive the privilege, he should be able to do so where the sole objecting parties have such a conflict. Cf. *Garner* v. *Wolfinbarger, supra* (shareholders may for good cause overcome management's assertion of attorney-client privilege in derivative action).

[49] See also, *e.g.*, *In re O.P.M. Leasing Services*, 13 Bankr. 54, 62 (Bankr. S.D.N.Y. 1981); *In re O.P.M. Leasing Services*, 13 Bankr. 64, 70 (S.D.N.Y. 1981) (in view of the apparent conflict of interest on the part of individuals attempting to assert the debtor corporation's attorney-client privilege, even if they have some claim to speak for the corporation they may not assert its privilege to protect their personal interests).

be expected to act in its best interests: the only motive they might have for asserting the corporate privilege would be the protection of their own personal interests. See generally *Valente* v. *Pepsico, Inc.*, 68 F.R.D. 361, 369-370 n.16 (D. Del. 1975).

On the other hand, the policy concerns expressed by the court of appeals (Pet. App. 9a-11a) are misplaced.[50] The "potential chilling effect on attorney-client communications" (*id.* at 10a) is no greater here than in the case of a solvent corporation: individual officers and directors always run the risk that present or successor management may waive the corporation's privilege with respect to their communications with counsel (see pages 10-11, *supra*).[51] No in-

[50] The court's concerns are especially unpersuasive because it failed to take into account that the attorney-client privilege, which inhibits the truth-seeking process, must be "strictly confined within the narrowest possible limits consistent with the logic of its principle." 8 *Wigmore on Evidence, supra*, § 2291, at 554. See *Trammel* v. *United States*, 445 U.S. at 50.

[51] *In re O.P.M. Leasing Services*, 13 Bankr. at 57, 67-68. Individual officers' interests and those of the corporation may coincide; but management may determine that the officer acted in his own self-interest to the detriment of the corporation. Cf. *New York Central & Hudson River R.R.* v. *United States*, 212 U.S. 481, 492-495 (1909); Note, *Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 Harv. L. Rev. 1227, 1246-1252 (1979). In that situation, management acting as a collective entity has a strong interest in waiving the privilege. And even if the corporation may face some potential liability for its officers' or employees' misconduct, the corporation may determine that it is in its best interest to attempt to avoid liability by promptly bringing the misconduct to the attention of government authorities. See Fauretto & Reeves, "Department of Justice Disclosure" in Block & Pickholz, *The Internal Corporate Investigation* 253-265; Mann, "Disclosure of Results of Investigation," *supra*, at

dividual has the legitimate expectation that the corporation will later assert the privilege for his personal benefit.[52] The chilling effect, if any, arises in all such cases from the fact that the privilege is that of the corporation, not its officers or directors.

The court's statement (Pet. App. 9a) that waiver by the trustee would "condone an inequality of treatment between bankrupt corporations and bankrupt individuals" is also unpersuasive. Corporations, as "artificial creature[s] of the law" (*Upjohn Co.* v. *United States*, 449 U.S. at 389-390), must act through natural persons to exercise their rights. It does not discriminate against a corporation to designate the trustee—who now constitutes the "management"—as the person to act on its behalf.[53] Finally,

117-125. In any event, reporting requirements imposed on public corporations may require disclosure of misconduct on the part of management. See *Handler* v. *SEC*, 610 F.2d 656 (9th Cir. 1979); *SEC* v. *Joseph Schlitz Brewing Co.*, 452 F. Supp. 824 (E.D. Wis. 1978); Block & Barton, *Internal Corporate Investigations: Maintaining the Confidentiality of a Corporate Client's Communications with Investigative Counsel*, 35 Bus. Law. 5 (1979).

[52] In internal investigations of possible wrongdoing, corporate counsel routinely advise corporate officers and employees that the attorney represents the corporation and that the individual may not be able to assert a privilege with respect to his communications to the attorney. See Kirkpatrick, "How to Conduct An Internal Corporate Investigation," in Block & Pickholz, *supra*, at 82; Bialkin, "Legal and Practical Considerations for Disclosure of the Results of an Internal Corporate Investigation," *supra*, at 145.

[53] The court's statement (Pet. App. 10a) that waiver by the trustee would allow the attorney-client privilege to "vanish" on the "whim" of the trustee is plainly incorrect. The trustee's waiver must be based on his judgment as to the best

the court's concern (Pet. App. 10a) over discrimination against bankrupt corporations as compared to solvent ones is groundless. The same rule applies to both: the privilege may be waived by the present management. Any difference in treatment results from the fact that the management of a corporation undergoing liquidation is placed in the hands of a trustee pursuant to the Bankruptcy Code.[54] Indeed, the court of appeals' decision works to the disadvantage of corporations in bankruptcy by preventing them from effectively pursuing valid claims against officers and directors. Cf. *Handler* v. *SEC*, 610 F.2d 656 (9th Cir. 1979).

2. Denying the trustee authority over the debtor's attorney-client privilege would foreclose an important avenue of voluntary cooperation between the government and bankruptcy trustees. Such a result would

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interests of the estate (see pages 34-36, *infra*), not on a "whim." Cf. *In re Curlew Valley Associates*, 5 Collier Bankr. Cas. 2d 255, 259 n.5, 264 (Bankr. D. Utah 1981) (business judgment rule applies to decisions of reorganization trustee). And waiver of the privilege by the trustee, acting for the debtor, no more causes the privilege to "vanish" than does any other proper waiver by the party authorized to make it.

[54] Of course the Bankruptcy Code is premised on the need to treat insolvent individuals and corporations differently from solvent ones. See generally, *e.g.*, *NLRB* v. *Bildisco & Bildisco*, *supra*. The Code provides debtors with certain important advantages, such as a stay of creditors' actions (11 U.S.C. 362). See also SEC Report, 107 ("When a corporation avails itself of the protection of the bankruptcy court, it is enabled to stave off its creditors. The court protects its property from dismemberment by executions and attachments. It has the benefit of what in equity was of the 'chancellor's umbrella'. But that umbrella should not be held by the debtor, but by the court through its trustee.") (citations omitted).

prevent the trustee from conducting effective investigations into causes of action against former management at the least cost to the estate as well as seriously impede the government's ability to enforce criminal, commodity and securities laws.

Corporate bankruptcies are not infrequently associated with fraud or other misconduct by former management.[55] When corporate management outside bankruptcy initiates an investigation of individual officers and directors who are suspected of misconduct—an increasingly common occurrence[56]—it is not acting contrary to the *corporation's* self-interest.[57] The trustee in bankruptcy is acting no differently. In either case, the investigation is conducted to protect the property and economic interests of the entity.[58]

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[55] Such misconduct may have particularly severe repercussions with respect to the bankruptcy of commodity brokers. See pages 19-21, *supra*. The Commission's effectiveness in this area is therefore especially important. Accordingly, the CFTC has the right to appear and be heard on any issue in commodity broker liquidations (11 U.S.C. 762(b)), and qualifies as a party in interest. As such, the Commission has participated in the CDCB liquidation. Similarly, insider misconduct often results in the bankruptcy of publicly held corporations. See, *e.g.*, *In re Equity Funding Corp.*, 375 F. Supp. 1378, 1380-1381 (J.P.M.D.L. 1974); *In re Saxon Industries, Inc.*, 29 Bankr. 319 (Bankr. S.D.N.Y. 1983). In part because of the frequency of such occurrences, the SEC has the right to participate in reorganization proceedings under Chapter 11 (11 U.S.C. 1109(a)). See S. Rep. 2073, 75th Cong., 3d Sess. 6-10 (1938).

[56] See Mann, "Disclosure of Results of Investigation," in Block & Pickholz, *supra*, at 109.

[57] See, *e.g.*, *id.* at 116; note 51, *supra*.

[58] Waiver of a corporation's attorney-client privilege in order to advance its economic interests is consistent with the

Management often will conclude that voluntary cooperation with the government in its investigations of prior management, including, when appropriate, waiver of the attorney-client privilege, is in the best interests of the corporation.[59] The trustee may likewise determine that it is in the estate's best

nature of the privilege itself as it applies in the corporate context. The purpose of the privilege is, of course, to encourage full and frank communications between attorneys and their clients. *Upjohn Co.* v. *United States,* 449 U.S. 383, 389 (1981). Such communications on the part of corporate agents to corporate counsel are valued as a means of asserting and defending the corporation's economic interests and property rights. *In re Silvio De Lindegg Ocean Dev., Inc.,* 27 Bankr. at 28; see also *Joy* v. *North,* 692 F.2d at 887 (decision to bring a lawsuit is a "corporate economic decision"); cf. *Bellis* v. *United States,* 417 U.S. 85, 89-92 (1974); *United States* v. *White,* 322 U.S. 694, 699-700 (1944); see generally, *e.g., Hooper* v. *Mountain States Securities Corp.,* 282 F.2d 195, 206-207 (5th Cir. 1960), cert. denied, 365 U.S. 814 (1961) (fraud on corporation is as an injury to property); *Empire Tractor Corp.* v. *Time, Inc.,* 91 F. Supp. 311, 312 (E.D. Pa. 1950) (libel action on behalf of corporate plaintiff "is concerned exclusively with an injury to property" and so may be pursued by bankruptcy trustee). Hence, access to and control over the communications on the part of the trustee to advance the economic interests of the estate will not impede any interest legitimately served by the communications themselves. If the attorney is also acting as counsel for an individual corporate agent, that agent may be able to assert the privilege in his own right. *E.g., Diversified Industries, Inc.* v. *Meredith,* 572 F.2d 596, 611 n.5 (8th Cir. 1978) (en banc); *Citibank,* 666 F.2d at 1196.

[59] See Herlihy & Levine, *Corporate Crisis: The Overseas Payment Problem,* 8 Law & Policy in Int'l Bus. 547 (1976). In and out of the bankruptcy context, voluntary cooperation by persons or corporations being investigated by the government is important to the effective enforcement of the law.

interest to allow the government to undertake the burden and expense of such investigations, and then to file civil actions in their wake.[60] Such an approach conserves the estate's limited assets and may provide the best opportunity for discovery of significant causes of action on behalf of the estate.

In seeking control over privileged information, the trustee is not acting as a prosecutor in conflict with the corporation.[61] To the contrary, his disclosure of the information may be necessary in order to maximize the assets of the estate.[62] The trustee acts not merely for creditors, but for all claimants to the estate, including the corporation's equity holders. See

[60] The Commodity Exchange Act contemplates that the Commission will provide such assistance to trustees. In a 1982 amendment to Section 8(a) of the Act (7 U.S.C. 12(a)), Congress authorized the Commission to disclose confidential market and business information to equity receivers and bankruptcy trustees for commodity brokers to assist them in their efforts to marshal assets for distribution to customers. See *CFTC Reauthorization: Hearings on H.R. 5447 Before the Subcomm. on Conservation Credit and Rural Development of the House Comm. on Agriculture,* 97th Cong., 2d Sess. 11 (1982) (statement of Philip McBride Johnson, Chairman, Commodity Futures Trading Commission); *CFTC Reauthorization: Hearings on S. 2109 Before the Subcomm. on Agricultural Research and General Legislation of the Senate Comm. on Agriculture, Nutrition, and Forestry,* 97th Cong., 2d Sess. 5 (1982) (statement of Philip McBride Johnson).

[61] Such a mischaracterization underlies the decision in *In re Vantage Petroleum Corp.,* 40 Bankr. at 40, which followed the decision of the court of appeals in this case.

[62] Indeed, the trustee often requires control over privileged information to raise defenses to claims against the estate's property. See 11 U.S.C. 541(e) (redesignated by Pub. L. No. 98-353, §§ 456(d), 470, as 11 U.S.C. 558 (1984)); cf. *Miller* v. *New York Produce Exchange,* 550 F.2d 762, 767-768 (2d Cir.), cert. denied, 434 U.S. 823 (1977).

pages 16-17, *supra*. His function in waiving the attorney-client privilege is not to enable him to attack former management, but simply to increase the assets of the estate.[63]

The principal application of the decision below will be to situations where prior management has, through illegal actions, injured the corporation and its creditors, shareholders, and customers. It grants officers and directors of insolvent corporations the power to foreclose effective investigation into their own misconduct, and will thereby frustrate the legitimate efforts of bankruptcy trustees and law enforcement authorities.

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[63] Where it is not, in the trustee's judgment, in the best interests of the estate because of possible third-party claims, the trustee presumably would not waive the privilege. See Chicago Note 22. This case relates solely to the trustee's power over the privilege. It does not raise the issue whether the waiver here was in the best interests of the estate, which is a question to be determined in the first instance by the bankruptcy court. Respondents, however, did not challenge the trustee's waiver in bankruptcy court and they may not do so for the first time here as a defense to this subpoena enforcement action. In any event, the waiver here plainly would be beneficial to the estate, as it would enable the trustee to obtain the assistance of the Commission in uncovering assets of the estate. There has been no suggestion of possible losses *to the estate* that might outweigh these gains.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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DECEMBER 1984

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No. 84-261

In the Supreme Court of the United States

OCTOBER TERM, 1984

COMMODITY FUTURES TRADING COMMISSION,
PETITIONER

v.

GARY WEINTRAUB, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED AUGUST 16, 1984
CERTIORARI GRANTED OCTOBER 29, 1984

58 pp
& oldout

TABLE OF CONTENTS

The following materials appear in the appendix to the Petition:

U.S. Court of Appeals
Seventh Circuit — Docket

Misc. No. **AIMS** **82-2420**

General No. _____

Related Nos. _____

☐ Pvt. Civil ☒ U.S. Civil ☐ Tax Court ☐ Orig. Petition
☐ Admin. Review ☐ Admin. Enforcement ☐ Bankruptcy ☐ Criminal

District N. Ill., E. Div
Number 81 C 6996
Judge Nicholas J. Bua

Filed in D.C. 12-15-81
Notice of Appeal 09-03-82
1-850

Federal Prisoner ☐
State Prisoner ☐
Type Petition _____

Title:

COMMODITY FUTURES TRADING COMMISSION,
Petitioner-Appellee

vs.

GARY WEINTRAUB,
Respondent

AND

FRANK H. MCGHEE and ANDREW MCGHEE,
Intervening Respondents-Appellants

MAR 23 1983

Summary Of Events

Docketed: 09-13-82
Docket Fee Paid: YES in Forma Pauperis ☐
Appendix: _____
Appellant's Brief: 10/25/82
Appellant's Brief: _____
Appellee's Brief: 12/27/82 (APP)
Appellee's Brief: _____
Reply Brief: 12/27/82
Intervenor's Brief: _____
Amicus Curiae Brief: 2-13-84
Additional Authority: 12/27/82 4-22-83 dist. 4/25/83 dist. 7-6-83 dist.
Notice of Oral Arg: 3-14-83

Briefs Distributed: _____
Date of Oral Arg: 4-8-83
Panel: PELL, COFFEY, WEIGEL
Opinion Date: 11-21-83 - Weigel
Disposition: REVERSED. On 3-19-84: REIS.
Disposition: REVISED OPINION with CERTAIN AMENDMENTS. 1-27-84 dist.
Petition For Rehearing: 1-6-84 dist. 1-23-84 ans. En Banc ☒ 2-1 dl
Granted ☐ Denied ☒ 4-18-84 3-30 dl
Mandate Issued: 4-26-84 Bill of Costs: _____
Record Returned: 4-26-84 part.
Date Reinstated: _____
Reported At: 722 F2d 338

Short Record Filed 09-13-82
Original Record Filed 9-22-82
Pleadings: 1 volumes.
Transcripts: _____ volumes.
Depositions: _____ volumes.
Exhibits: 1 env. IN CAMERA
Other: _____

Date	Supplemental Records Content

Record Withdrawal

		Date	By Whom	Returned
1 v. pldg.	236-3600	10-15-82	JWStephenson	10/26/82
1 v. pldg.	202-254-9880	11-24-82	H.Bledman	
1 v. pldg.	FTS 254-9880	12-1-82	Blechman	12/20/82
1 v pldgs	236-3600	12-27-82	Stephenson	12/27/82
1 pldg., 1 env. IN CAMERA, 1 tape		4-11-83	LC	9-20-83
1 v. pldg.	202-254-9880	12-8-83	Blechman	1-6-84

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Intervenor

9-22-82	James W. Stephenson, JANN,CARROLL, SAIN & DOLIN, 55 E. Monroe St., Ste. 4444. Chgo. 03 "	236-3600
1-5-83	David A. Epstein "	

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"	Kenneth M. Raisler, Dep.Gen. " " " Wash,DC 20581	"
"	Helen G. Blechman, " " " " "	"

Intervenor

Amicus Curiae

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~~v3-30-84~~	Dean C. Harvalis, Joseph A. Baldi, Ofc. of the US Trustee, 175 W. Jackson Blvd., Suite A-1335, Chgo. 04	~~886~~-5785

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT—DOCKET

82-2420

Date	FILINGS-PROCEEDINGS
1982	
9-17	ORDER: On or before 9-27-82, intervening respondents-appellants to file a statement explaining why this appeal should not be dismissed as moot. (See order for details)
9-24	Filed intervening respondents/appellants' motion for stay pending appeal.
9-27	ORDER: Notice to Respond to appellee to respond on or before 10-1 on appellants' motion for stay.
10-1	ORDER: GRANTED appellee's motion for extension and time for filing response to intervening appellants' motion for stay is extended to incl. Tues. 10-5-82.
10-1	Filed appellee's motion for extension of time to file response to intervening appellant's motion for stay pending appeal.
10-5	Filed memo of appellee in opposition to intervening appellants' motion for stay pending appeal.
10-15	Filed intervening respondents/appellants' motion for leave to file reply, instanter.
10-15	Filed intervening respondents/appellants' motion for leave to file reply, instanter.
10-18	DENIED McGhees' motion for stay pending appeal.
10-26	Filed intervening respondents/appellants' motion for reconsideration of denial of stay pending appeal and for expedited appeal.
10-25	Filed 15c intervening respondents/appellants' brief.

Date	FILINGS-PROCEEDINGS
11-4	ORDER: Motion for leave to file reply is GRANTED and this court has considered reply-motion for stay pending appeal. This court has reconsidered its order of 10-18-82. Because intervening respondent appellants have raised no new arguments that would necessitate this court's modifying its original order, "motion for reconsideration of denial of stay pending appeal and for expedited appeal" is DENIED. Standard briefing schedule to apply.
11-18	Filed appellee's motion for extension of time within which to file brief of the commodity futures trading commission.
11-30	ORDER: GRANTED appellee's motion and time for filing brief is extended to & incl. 12-10-82. Further ordered that the reply brief, if any, due on or before 12-27-82.
12-20	Filed appellee's motion for leave to file brief of Commodity Futures Trading Commission Instanter. 15c tendered.
12-27	Filed 15c appellee's brief, per order.
12-27	Filed 15c appellant's reply brief.
12-27	Filed appellees citation of additional Authority. 0&6c
12-27	ORDER: appellee's motion of 12/20 GRANTED, clk has filed instanter 15c appellee's brief. appellants reply brief due 1/10/83.
1983	
3-14	ORDER: Notice of Oral Argument set oral argument on Fri. 4-8-83 at 9:30 AM. Further ordered that oral argument be limited to 20 min. side.
4-8	Heard & taken under advisement.
4-22	Filed appellee's cit. of addl. auth. per CR 11, dist.
4-25	Filed appellant's additional authority, dist.
v7-6	Filed cit. of addl. auth. per CR 11 from intervenor, dist.

Date	FILINGS-PROCEEDINGS
v11-21	Filed Opinion by J. Weigel, REVERSED.
v11-21	ORDER: Final judgment, REVERSED, with costs.
v12-2	Filed appellee's motion for extension of time to file petition for rehearing
v12-15	ORDER: GRANTED appellee's motion. Appellee's petition for rehearing due before 1-6-84.
1984	
v1-5	Filed motion of Securities Investor Protection Corp. for leave to file amicus curiae.
v1-6	Filed appellee's motion for leave to suppl. the record.
v1-6	Filed appellee's pet. for rehearing & en banc, dist.
v1-6	ORDER: DENIED counsel for Securities Investor Protection Corp.'s motion file brief as amicus curiae.
v1-6	filed SEC's (amicus curiae) statement urging that this court grant the petition of the CFTC's for rehearing & en banc.
v1-6	Filed Trustee's (Notz) motion for leave to intervene and file a petition brief in support of rehearing en banc, or, in the alternative, for leave a brief in support of rehearing en banc as amicus curiae.
v1-6	Filed motion of U.S. Trustee (DeWitt) for leave to file a brief amicus curiae in support of petition for rehearing.
v1-9	Filed notice to respondent to file ans. to petition for rehearing & en banc ans. not to exceed 15 pages & bound in same color cover as brief, 25c required and due 1-23-84.
v1-23	Filed 25c intervening appellants' answer to pet. for rehearing, dist. en banc
v1-23	Filed intervening appellant's provisional motion for leave to suppl. the record

Date	FILINGS-PROCEEDINGS
v1-27	Filed per order 25c amicus curiae's (U.S. Trustee) brief in support of Commission's pet. for rehearing and en banc, dist.
v1-27	ORDER: Appellee's and intervenor's motions to suppl. the record remain under advisement. DENIED trustee's motion to intervent but GRANT permission t— a brief as amicus curiae within 10 days of this order. This court will do nothing at this time involving SEC statement re CFTC pet. for rehearing and further ordered that U.S. Trustee's motion to file brief amicus curiae be GRANTED and clerk to file instanter the 25 tendered copies of US Trustee brief as amicus curiae.
v1-31	ORDER: GRANTED CFTC's & intervenors' motions to suppl. the record.
v2-1	Filed Trustee's (Notz) motion for extension of time.
v2-6	ORDER: GRANTED Trustee's counsel motion and Trustee for CDCB is granted to & incl 2-13-84 to file brief in support of rehearing en banc as amicus cruiae.
v2-13	Filed 25c trustee's brief as amicus curiae for rehearing & en banc, 25c appdx., dist.
v3-8	Received notice from CFTC of withdrawal of former Gen. Counsel Dutterer & appearance of Dep. Gen. Counsel Adams.
v3-14	Filed USA's motion for leave to file a brief amicus curiae in support of pet. for rehearing, 15c brief tendered.
v3-19	ORDER: Court withdraws its opinion of 11-21-84. Court now reissues its revised & amended Opinion in this case, being in the form & words of opinion of 11-21-83 with exception of certain amendments set forth in the attached exhibit. The CFTC having filed its pet. for rehearing & en banc, any revisions or amendments to said

Date	FILINGS-PROCEEDINGS
	petition or amicus briefs to be filed within 14 days of the date of this order, and upon failure to file any amendments or revisions, it will be assumed that petition and amicus briefs are redirected to opinion of this court as presently revised. A response to suggestion for rehearing en banc having been called for, the intervenor-appellees shall have 10 days to respond to any revisions or amendments to the petition rehearing or amicus brief.
v3-20	ORDER: DENIED USA's motion for leave to file a brief amicus curiae (Reasons in detail on orig. order)
v3-30	Filed 25c CFTC's amended pet. for rehearing & en banc, dist.
v4-2	Filed 25c SEC's judicial notice, dist. en banc.
v4-13	Filed McGhees' motion for leave to file instanter suppl. response intervenors-appellants to amended petition for rehearing en banc, 25c response tendered.
v4-18	ORDER: DENIED petition for rehearing.
v4-26	Mandate issued, partial record returned.
v4-26	Filed receipt for dist. ct. for mandate & part. record.
v4-30	ORDER: DENIED interv. appellants' motion to file instanter suppl. response.
v8-24	Filed notice from Supreme Ct. of US of filing pet. for cert., their #84-261.

DOCKET ENTRIES, NO. 81-C-6996 (N.D. ILL.)

12-16-81 1 Filed 12-15-81 Application for order to show cause

12-16-81 2 Filed 12-15-81 Civil Cover Sheet

12-16-81 3 Filed 12-15-81 Notice of filing

1-20-82 4 Filed 1-19-82: Plaintiff's Notice of Filing; Application for Entry of a Protective Order.

1-20-82 5 Filed 1-19-82: Plaintiff's Notice of Filing.

1-20-82 6 Filed 1-19-82: Plaintiff's Applicant's Memorandum of Points and Authorities in Support of Application for an Order to Compel Answers to Deposition Questions.

1-20-82 7 Filed 1-19-82: Plaintiff's Notice of Filing.

1-20-82 8 Filed 1-19-82: Plaintiff's Exhibits to Application for an Order to Show Cause and Order to Compel Answers to Questions. (Vault)

1-20-82 9 Enter order dated 1-19-82: C.F.T.C. is granted leave to file, instanter, its exhibits under protective Order. Access to these exhibits shall be limited to respondent, Gary Weintraub, and his counsel, Robert A.W. Boraks. (Draft)—BUA, J.
Mailed notices 1-20-82.

1-27-82 10 Filed 1-26-82: Notice of Filing; Plaintiff's (unsigned) Agreed Order.

1-27-82 11 Enter order dated 1-26-82: Respondent is to file answer to C.F.T.C.'s application for an order to show cause and to compel by February 19, 1982, and C.F.T.C. to reply by February 26, 1982. Court will advise the parties if it requires oral argument. —BUA, J. wp
Mailed notices 1-27-82.

3-5-82 12 Filed 2-26-82 respondent's notice of filing.

3-5-82 13 Filed 2-26-82 respondent's memorandum in opposition to the application for an order to compel answers to deposition questions. am

3-16-82 14 Filed 3-12-82: Applicant's Notice of Filing.

3-16-82 15 Filed 3-12-82: Applicant's Errata to Applicant's Memorandum of Points and Authorities in Support of Application for an Order to Compel Answers to Deposition Questions filed January 19, 1982.

3-16-82 16 Filed 3-12-82: Reply of the Commodity Futures Trading Commission to Respondent's Memorandum in Opposition to the Application for an Order to Compel Answers to Deposition Questions. wp

3-19-82 17 Filed 3-19-82: Applicant's Notice of Filing.

3-19-82 18 Filed 3-19-82;; supplemental Submission to the Reply of the Commodity Futures Trading Commission.

3-19-82 19 Filed 3-19-82: Respondent's Notice of Motion.

3-19-82 20 Filed 3-19-82: Respondent's Motion for Oral Argument on Application to Compel.

3-19-82 21 Enter order dated 3-19-82: Respondent's motion for oral argument on aplication to compel will be referred to a Magistrate.— BUA, J. wp Mailed notices 3-22-82.

3-24-82 22 (a) Enter order dated 3-18-82: The above-captioned cause is currently pending on my calendar. I recommend to the Executive Committee that this case be referred to a Magistrate of this Court. The reasons for my recommendation are: Hear and enter orders on discovery motions; application to compel answers to deposition questions.— BUA, J.
(b) Enter order dated 3-19-82: It is hereby ordered that the above-captioned case be referred by lot to a Magistrate of the Court in accordance with the Rules.—McMILLEN, Acting Chief Judge for the EXECUTIVE COMMITTEE.
REFERRED TO MAGISTRATE SUSSMAN.
Mailed notices 3-24-82.

3-25-82 23 Enter order dated 3-24-82: This matter is set for status hearing April 22, 1982, at 9:30 a.m. on applicant's application to compel answers to deposition questions.— SUSSMAN, M. wp
Mailed notices 3-25-82.

4-23-82 24 Enter order dated 4-22-82: Oral argument held. Counsel directed to submit a draft order pursuant to Magistrate's ruling on the applicant application for an order to compel answers to deposition questions.—Mailed notices 4-23-82. SUSSMAN, M. wp

4-27-82	25 Enter order dated 4-26-82: It Is Ordered application of applicant's to compel answers to deposition questions granted. (Draft)—SUSSMAN, M. Mailed notices 4-26-82. wp
5-12-82	26 Filed 5-6-82: Respondent's Notice of Filing.
5-12-82	27 Filed 5-6-82: Respondent's Objection to Magistrate's Order. wp
5-26-82	28 Filed 5/25/82 Notice of Motion by plaintiff.
5-26-82	29 Filed 5/25/82 Motion for Ruling on Objection to Magistrate's Order Pursuant to Local Rule 13(d).
5-26-82	30 Enter order dated 5/25/82: Respondent to file reply in support of objections to Magistrate's order by June 1, 1982, and to submit copy of transcript of oral argument had before the Magistrate.-BUA, J. Mld. notices 5/26/82. ALP
5-27-82	31 Filed 5-19-82 Commodity Futures Trading Commission's notice of filing.
5-27-82	32 Filed 5-19-82 response of the Commodity Futures Trading Commission to objection to Magistrate's order filed by Gary A. Weintraub. am
6-4-82	33 Filed 6-1-82 respondent's notice of filing.
6-4-82	34 Filed 6-1-82 respondent's memorandum in support of objection to magistrate's order.
6-15-82	35 Filed 6-8-82 notice of filing
6-15-82	36 Filed 6-8-82 Response of CFTC to Respondent's memorandum in support of his objections to the Magistrate's Order dk
6-16-82	37 Enter order dated 6-9-82: Ordered that respondent, Gary Weintraub, appear before representatives of the Commodity Futures Trading Commission and fully respond to the questions which are the subject of the Commission's Application without asserting an attorney-client privilege—BUA, J. Mld notices 6-16-82 dk
6-16-82	38 Filed 6-9-82 Appendix to CFTC's response to respondent's memorandum in support of his objections to the Magistrate's Order. dk
7-2-82	39 Filed 6-30-82 respondent's notice of motion.
7-2-82	40 Filed 6-30-82 respondent's motion to reconsider and to vacate or to clarify.

7-2-82	41 Filed 6-30-82 Intervenors' notice of motion.
7-2-82	42 Filed 6-30-82 intervenors' motion to intervene. am
7-2-82	43 Filed 6-30-82 intervenors' motion to vacate or modify.
7-2-82	44 Enter order dated 6-30-82: Frank H. McGhee and Andrew McGhee given leave to intervene. Applicant, C.F.T.C., to file answer to motions to vacate of modify order of June 9, 1982 by July 12, 1982, and respondents to reply by July 19, 1982.—Bua, J Mailed notices 7-2-82 am
7-14-82	45 Filed 7/12/82; Notice of applicant's filing
7-14-82	46 Filed 7/12/82: Joint response of the CFTC to Gary Weintraub's motion to reconsider and to vacate or to clarify and to the McGhee's motion to vacate or modify AC
7-19-82	47 Enter order dated 7/15/82: On the court's motion, this matter is set for status hearing August 20, 1982 at 9:30 a.m. Counsel for all parties are required to attend—SUSSMAN, M AC Mld notice 7/19/82
7-20-82	48 Filed 7/19/82: Notice of intervenors filing
7/20/82	49 Filed 7/19/82: Intervenors reply motion to vacate or modify order of June 9, 1982 AC
7/29/82	50 Enter order dated 7/27/82: The court clarifies its order of June 9, 1982 to provide that respondent shall respond to the specific questions at issue without asserting an attorney-client privilege on behalf of Chicago Discount Commodity Brokers Inc—BUA, J AC Mld notice 7/29/82
8/24/82	51 Enter order dated 8/20/82: Status hearing reset to 8-24-82 at 9:30 a.m.—SUSSMAN, M. Mld notices 8/24/82 REW
8-26-82	52 Enter order dated 8/24/82: Status hearing held. Status hearing continued to 9-22-82 at 9:30 a.m.—SUSSMAN, M. Mld notices 8/26/82 REW
9-2-82	53 Filed 9/2/82 Notice of filing
9-2-82	54 Filed 9/2/82 Intervenors Frank H. McGhee and Andrew McGhee's NOTICE OF APPEAL re: order of 4-26-82, 6-9-82 and 7-27-82 ($70.00 PAID)

9-3-82 Transmitted 9/3/82 to the 7th Circuit Court of Appeals: the Short Record on Appeal consisting of copy of NOA, copy of docket and 7CCA info. sheet.

9-3-82 Mailed to all counsel of record: Cir. Rule 4 letter and copy of notice of appeal with copy of docket and 7CCA transcript info. sheet to appellant REW

9-9-82 55 Filed 9-9-82: Notice of appellant's filing

9-9-82 56 Filed Intervenor's/Appellant's Designation for inclusion in record on appeal AC

9-15-82 57 Filed 9-14-82: USCA Appearance form 82-2420 AC

9-16-82 Certified and transmitted 9-16-82 to the 7th Circuit Court of Appeal the Original Record on Appeal consisting of One volume of pleadings, together with One Confidential Item (#8), filed under separate certificate, for convenience sake

9-16-82 Mailed 9-16-82 to all counsel of record: copies of transmittal letter, list of documents and certificates REW

9-28-82 58 Filed 9-23-82: Notice of motion for stay

9-28-82 59 Filed 9-23-82: Intervenors notice of motion

9-28-82 60 Filed 9/23/82: Intervenors/Appellants motion for stay

9/28/82 61 Enter order dated 9/23/82: Intervenors motion for stay pending appeal is denied— BUA, J AC
Mld notice 9/28/82

10/5/82 62 Enter order dated 9/22/82: Status hearing held. Status hearing continued to December 8, 1982 at 9:30 a.m.—SUSSMAN, M AC Mld notice 10/5/82

11-10-82 63 Filed 11/9/82: Notice of motion; Plaintiffs motion for entry order setting date of respondents deposition

11/10/82 64 Enter order dated 11/9/82: C.F.T.C.'s motion for order setting date of respondents deposition is denied pending determination of motion for reconsideration pending in the U.S.C.A.—BUA, J AC Mld notice 11/10/82

11/17/82 65 Filed 11/16/82: Notice of motion of plaintiff

11/17/82 66 Filed 11/16/82: Renewed motion for entry of order setting date of respondents deposition

11/17/82 67 Enter order dated 11/16/82: Applicants renewed motion for order setting date for deposition is entered and continued— BUA, J AC Mld notice 11/17/82

12/9/82 68 Enter order dated 12/8/82; Status hearing held, status hearing continued to January 25, 1982 at 9:30 a.m.—SUSSMAN, M AC Mld notice 12/9/82

12/17/82 69 Enter order dated 12/16/82: All matters relating to the referral of the above entitled cause having been resolved, the cause is returned to the assigned Judge for further proceedings. Status hearing set for January 25, 1983 is stricken—SUSSMAN, M AC Mld notice 12/17/82

5/1/84 70 Filed 4/26/84: Certified copy of order from USCA: It is ordered that petition for rehearing be and the same is hereby DENIED.

5/1/84 71 Filed 4/26/84: It is ordered and adjudged by the USCA: that the District court judgment in this cause appealed from be and the same is hereby REVERSED, with costs in accordance with the opinion of this court filed this date.

5/1/84 Rec'd 4/26/84: Contents of record on appeal from USCA consisting of 1 v of pleadings. MN

11/1/84 72 Filed 10/31/84: Notice of removal of material from the custody of the clerk's office.

11/1/84 73 Enter order dated 10/31/84: Joseph Gac of the C.F.T.C. is given leave to withdraw the file in this cause for a period of 48 hours.—BUA, J. Mld notices 11/1/84. MN

CONSENT OF THE DIRECTORS OF CHICAGO DISCOUNT COMMODITY BROKERS, INC. TO THE ADOPTION OF RESOLUTIONS

The undersigned, being all of the Directors of CHICAGO DISCOUNT COMMODITY BROKERS, INC., an Illinois corporation, pursuant to the authority of Section 147.1 of The Business Corportion Act of the State of Illinois, do hereby given our written consent, in lieu of a meeting, to the adoption of the following resolution:

RESOLVED, that the proper officers of the corporation are authorized to redeem the 346 shares of common stock of Frank McGhee for the amount of $15,000, payable on January 1, 1985.

FURTHER RESOLVED, that the proper officers of the corporation are hereby authorized to enter into and execute, on behalf of the corporation, a stock redemption agreement with Frank McGhee, in form satisfactory to counsel for the corporation, to accomplish such redemption, and all notes and collateral documents that may be required.

FURTHER RESOLVED, that the proper officers of the corporation are authorized and directed to execute and file, on behalf of the corporation, all reports and other documents that may be required with respect to such redemption, in compliance with all applicable federal and state laws, rules and regulations.

/s/ _____
FRANK MCGHEE

/s/ _____
ANDY MCGHEE

/s/ _____
LARRY COTE

DATED: OCTOBER 23, 1979.

October 21, 1980

Frank H. McGhee, President
Chicago Discount Commodity Brokers, Inc.
175 W. Jackson Blvd., Suite 1430
Chicago, Illinois 60604

Dear Frank:

I hereby resign as Officer and Director of Chicago Discount Commodity Brokers, Inc., effective immediately.

/s/ _____
ANDREW M. MCGHEE

AMM/eo

cc: Larry M. Cote
Gary A. Weintraub

October 22, 1980

TO: Frank McGhee, President
Chicago Discount Commodity Brokers

I am not in agreement with managerial operations of Chicago Discount Commodity Brokers. My input has been disregarded in controlling the activities of Chicago Discount Commodity Brokers. My function as an officer has been ineffectual and therefore I am resigning as a director of all offices which I hold. Including my office as Secretary and Vice President of Chicago Discount Commodity Brokers, effective October 22, 1980.

Sincerely,

/s/ _____
LARRY COTE

CONSENT OF THE SOLE DIRECTOR OF CHICAGO DISCOUNT COMODITY BROKERS, INC. TO THE ADOPTION OF A RESOLUTION

The undersigned, being the sole Director and officer of CHICAGO DISCOUNT COMMODITY BROKERS, INC., an Illinois corporation, pursuant to the authority of Section 147.1 of the Illinois Business Corporation Act, do hereby give my written consent, in lieu of a meeting, to the adoption of the following resolution:

RESOLVED, that the Corporation, through Frank H. McGhee, President, is authorized to enter into a consent decree to be filed with and approved by the United States District Court for the Northern District of Illinois, Eastern Division, in form attached.

FURTHER RESOLVED, that Frank H. McGhee, President, is authorized to execute the said consent decree on behalf of the Corporation.

/s/ _____
FRANK H. MCGHEE
Sole Director

DATED: OCTOBER 27, 1980

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 80 C 5755

COMMODITY FUTURES TRADING COMMISSION, PLAINTIFF,

v.

CHICAGO DISCOUNT COMMODITY BROKERS, INC.,
DEFENDANT

TRANSCRIPT OF PROCEEDINGS

had in the hearing of the above-entitled cause before the Honorable JAMES B. MORAN, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Monday, October 27, 1980, at 4:00 p.m.

APPEARANCES:

Mr. Constantine J. Gekas
Ms. Gloria J. Matthews
on behalf of the Plaintiff;
Mr. Lloyd A. Kadish
Mr. Peter Berman
on behalf of the Defendant.

THE CLERK: 80 C 5755, CFTC versus Chicago Discount Commodity Brokers, Inc.; consent motion for preliminary injunction.

MR. GEKAS: Good afternoon, your Honor. My name is Chris Gekas and I am the regional counsel here in Chicago for the CFTC.

With me today is Miss Gloria Matthews, one of the staff attorneys from my office who represents the Commodity Futures Trading Commission in this matter.

MR. KADISH: Good afternoon, your Honor. My name is Lloyd Kadish and I am here with Peter Berman. We represent the Defendant CDCB.

THE COURT: Good afternoon.

MR. GEKAS: Your Honor, this is a matter that comes before the Court today for an emergency hearing on the Commission's complaint, which I believe the Court has before.

THE COURT: I do. Before I recessed, I took a fast look at the complaint in the draft order and the consent.

MR. GEKAS: Your Honor, we have signed copies of the original documents that the Commission filed downstairs in the Clerk's Office with the Court's original file. I understand that the consent, the signed copy of the consent along with the signed resolution of the Board of Directors of the corporation authorizing the consent are in the possession of defendant's counsel.

Briefly, your Honor, if I may, I will try and explain to the Court what this matter is.

THE COURT: Well, maybe I can summarize at least what it apears to be.

MR. GEKAS: Fine.

THE COURT: That is the defendant is in severe financial difficulties with undersegregated funds and counsel for defendant so notified the Commission on Saturday, and in order to protect people from getting hurt or more hurt, you are in here to try to put a freeze on everything so that there is a chance to sort things out.

MR. GEKAS: That is very succinctly stated, your Honor. That is correct.

I do additionally, your Honor, have some information that does not appear in the pleadings, specifically the names of two attorneys here in Chicago who have agreed to have their names submitted to the Court for the appointment of a receiver. The first is a partner, I believe, in the firm of Schiff, Hardin & Waite. His name is Andrew M. Kline, K-l-i-n-e. He is, I believe, in 7200 Sears Tower. He has been in practice in New York with a New York license since 1967, and, between 1973 and late 1979, he was with the Securities and Exchange Commission in their market regulations division in Washington, D.C., and was appointed director of that division in 1977 and served in that capacity until [4] 1979 when he came to join Schiff, Hardin. His firm and he himself has had, I believe, extensive expe-

rience with broker dealers, both in the securities field and in the commodities field.

The additional person is a Mr. John K. Notz, N-o-t-z, Junior, who is a partner in the firm of Gardner, Carton & Douglas. He has been in practice licensed since 19 He was in the Judge Advocate Corps of the United States Air Force since 1960. He has been with the firm here in Chicago doing trial work, and, since about 1962, a wide variety of general corporate work including work with broker-dealers and bankers and clearing houses in the commodities and securities area and has done a lot of trust-related work.

Neither of the gentlemen have been apointed as receivers before. However, we would proffer those two names, your Honor, to the Court. I do not believe—oh, I think I did, now that I think about it. I gave your minute clerk a copy of the order of appointment of the receiver.

THE COURT: You did.

MR. GEKAS: It is in blank as to the name of the particular lawyer who will serve as a receiver, should the Court choose to appoint one.

THE COURT: Mr. Kadish, do you have any—

MR. KADISH: We have no objection to either appointment, [5] your Honor.

THE COURT: Either one of them seems to be entirely appropriate. Does the Commission have any—

MR. GEKAS: Well, I would ask then that Mr. Notz be appointed, since I spoke with him today, select him if the Court has no objection. We would just choose arbitrarily between the two, equally qualified.

THE COURT: All right, that is satisfactory with me. The consent has been signed, but it hasn't been filed?

MR. BERMAN: That is correct, your Honor.

MR. GEKAS: That is correct, your Honor. We would ask that it be filed here in court if that would be appropriate.

THE COURT: That would seem to me to be appropriate before we go ahead.

MR. BERMAN: Here it is, your Honor.

MR. GEKAS: In addition, I believe there is a corporate resolution that is attached to it.

MR. BERMAN: That is correct.

MR. GEKAS: Your Honor, for the record, I would like to say that since the Commission learned on Saturday of this problem, at the first available opportunity, that is this morning, at about 8:30, we have sent auditors into the firm's offices and they have been engaged in the process of examining books and records since then.

[6] THE COURT: Ladies and gentlemen, I have a feeling you have got a busy week ahead of you.

MR. GEKIS: That is exactly right.

THE COURT: John K. Notz, N-o-t-z?

MR. GEKIS: Yes, your Honor, Junior. He asked me to specify the Junior, your Honor.

THE COURT: Done.

MR. GEKIS: Thank you very much, your Honor. We can get copies, certified copies of the Court's orders this afternoon I presume, by what means?

THE CLERK: As soon as I take it upstairs.

MR. GEKIS: Great. Thank you very much, your Honor.

MS. MATTHEWS: Thank you, your Honor.

MR. KADISH: Thank you, your Honor.

(Which were all the proceedings had and taken on the day and date aforesaid in the above-entitled cause).

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 80 C 5755

COMMODITY FUTURE; TRADING COMMISSION, PLAINTIFF

v.

CHICAGO DISCOUNT COMMODITY BROKERS, INC.,
DEFENDANT

CERTIFICATE

I, K. JOSEPH SNYDER, do hereby certify that the foregoing is a true, correct and complete transcript of the proceedings had in the hearing of the above-entitled cause before the Honorable JAMES B. MORAN, one of the Judges of said Court, in his courtroom in the United States Courthouse Chicago, Illinois, on Monday, October 27, 1980.

/s/ _____
Official Court Reporter
United States District Court
Northern District of Illinois
Eastern Division

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 80 B 14472

IN RE:

CHICAGO DISCOUNT COMMODITY BROKERS, INC., DEBTOR

ORDER

Upon the Application of Chicago Discount Commodity Brokers, Inc., debtor, praying for authority to appoint the Law Firm of Chatz, Sugarman, Abrams, Haber & Fagel of Chicago, Illinois; specifically, James A. Chantz, Richard N. Golding, Michael L. Stone, Ilene F. Goldstein, and Mary Anne Spellman to represent them as debtor in the Chapter 7 Proceeding and upon the Affidavit of James A. Chatz, one of the partners of Chatz, Sugarman, Abrams, Haber & Fagel; and it appearing that James A. Chatz is an attorney duly admitted to practice in this Court; and the Court being fully satisfied that neither Chatz, Sugarman, Abrams, Haber & Fagel nor James A. Chatz, Richard N. Golding, Michael L. Stone, Ilene F. Goldstein, or Mary Anne Spellman represents an interest adverse to Chicago Discount Commodity Brokers, Inc. or its estate in the matters upon which Chatz, Sugarman, Abrams, Haber & Fagel are to be engaged; that employment is necessary and would be in the best interest of the estate; due notice having been given to all parties in interest; this Court having jurisdiction; and the Court being fully advised in the premises, weherefore:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Chicago Discount Commodity Brokers, Inc., as debtor, be and is authorized to employ the Law Firm of Chatz, Sugarman, Abrams, Haber & Fagel to represent them as debtor in this Chapter 7 Proceeding of the Bankruptcy Code.

ENTER:
/s/ _____

DATED: NOVEMBER 24, 1980

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 80 B 14472

CHICAGO DISCOUNT COMMODITY
BROKERS, INC., DEBTOR

ORDER

This matter coming on to be heard upon the Motion of Chicago Discount Commodity Brokers, Inc. to strike the appearance of David F. Heroy as attorney for Chicago Discount Commodity Brokers, Inc.; due notice having been given to all parties in interest; this Court having jurisdiction over the subject matter; and this Court being fully advised in the premises:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that this Court enters an Order Striking the Appearance of David F. Heroy as attorney of record for Chicago Discount Commodity Brokers, Inc.

ENTER:
/S/ _____
Bankruptcy Judge

Dated: NOVEMBER 28, 1980

Excerpt from August 26, 1981
Deposition of Gary Weintraub

A (Referring to an October 20, 1980, deposit of $20,798.05 in Weintraub Account 00150)

Q Did you deposit that amount into that account on that date?

A NO.

Q Do you know if anyone deposited that money in that account on that date?

(Discussion off the record.)

MR. BORAKS: Could I request reading back of that last question?

(Question read.)

MR. BORAKS: I think that we've reached the first point in time where we have a bit of a snag, whether Mr. Weintraub knows that and the circumstances of whatever knowledge he has is related to confidential communications between him and a client; and unfortunately, I just don't think he can answer that question.

MS. OHLMILLER: All right. Can we have him assert the privilege for the record?

MR. BORAKS: Sure, sure.

THE WITNESS: I would like to answer the question, but I feel that, consistent with Attorney-Client privilege constraints with which I'm faced, that I cannot answer the question unless authorized to do so by client or clients.

(August 26, 1981 Dep. at 148-9)

* * *

Q Did you make any inquiry into the entry?

A Yes.

Q To whom did you make the inquiry?

A I don't think I could answer that question consistent with the rights and privileges of clients and feel constrained to assert the client's privilege.

(*id.* at 150)

* * *

[A-7] B. (Referring to an October 20, 1980, deposit of $31,657 in Weintraub Account 00151)

Q Did you deposit this amount in this account on or about that date?

A No, I did not.

Q Do you know if a deposit was made on that date in that amount?

A For the same reasons as with respect to the last statement that you showed me, I believe I must assert the privilege of the client with respect to that question, and perhaps to save some time, I think that's also going to be true with respect to 00152—

MR. BORAKS: Why don't you let her do it by the numbers?

THE WITNESS: Okay, I'm sorry.

MS. OHLMILLER: Q Do you know who was responsible for that entry?

A I believe I must also assert the privilege of the client with respect to that question, also.

(*Id.* at 151)

* * *

Q When did you first became aware of this entry? We're still talking about in Account 00151.

A My recollection, as I sit here, is that it would have been when I received the statement.

Q Did you make any inquiry into the entry of concerning the entry?

A The inquiry would have been the same inquiry that I mentioned a moment ago.

Q Okay, and to whom was that inquiry directed?

A I don't believe that I can answer that question consistent with the rights and privileges of client or clients.

(*Id.* at 151-2)

* * *

[A-8] C (Referring to an October 20, 1980, deposit of $31,468.50 into Weintraub Account 00152)

Q Did you deposit that amount in that account on that date?

A No.

Q Do you know if anyone deposited that amount in this account on that date?

A I believe that I must assert the rights and privileges of client or clients with respect to that question.

* * *

Q Did you authorize this entry or approve of this entry in any fashion?

A No.

Q When you first learned of the entry, did you question anyone about it?

A Yes.

Q And when would that have been?

A My recollection is that it was a day or several days after the date of the statement.

Q And it would have been the statement that you questioned the entries in the Account 00150 and 00151?

A Yes.

Q And to whom did you direct that inquiry?

A Consistent with the rights and privileges of client or clients, I don't believe I could answer that question.

(*Id.* at 153-4)

* * *

[A-9] D. (In reference to respondent's access to CDCB safe deposit boxes)

Q What was the purpose of going to the safe deposit box on those occasions?

A To place—

MR. BORAKS: One second.

(Witness consults with counsel.)

THE WITNESS: Could you read back the question.

(Question read.)

THE WITNESS: I believe I must assert the rights and privileges of client or clients with respect to that particular question.

(*Id.* at 159-60)

* * *

E Q Was there any discussion with Frank McGhee as to your duties and responsibilities as attorney for the corporation?

A I think I must assert the Attorney-Client privilege with respect to that question.

(*Id.* at 182)

* * *

[A-10] F Q Was there ever a discussion with Frank McGhee as to the number of hours that you would work on business pertaining to Chicago Discount Commodity Brokers after August of 1980?

MR. BORAKS: I'm sorry, could you read that question back?

(Question read.)

MR. BORAKS: Off the record.

(Discussion read).

THE WITNESS: I feel constrained to assert Attorney-Client privilege with respect to that question. Also, I must decline to answer unless authorized by the client to do so.

(*Id.* at 182-3)

* * *

G Q Did Ms. Blumeyer have a personal relationship with Frank McGhee?

A I feel constrained to assert the Attorney-Client privilege with respect to that particular question and must decline to answer unless otherwise directed by client.

(*Id.* at 197)

* * *

[A-11] H Q Do you know if Ms. Blumeyer had commodity accounts at Chicago Discount?

A I believe that she did.

Q Upon what do you base that belief?

A As I sit here today, I'm really not sure of the source of that belief, and I'm reluctant to get into that since the source of that belief may be within the matters covered by privilege, Attorney-Client privilege.

MS. HARVITT: What grounds are you asserting the privilege, the Attorney-Client privilege?

MR. BORAKS: What if Frank McGhee told him that?

MS. HARVITT: It's unclear to me whether or not Nancy Blumeyer is the client or McGhee is the client or CDCB is the client. That's all I'm trying to establish.

MR. BORAKS: Well, CDCB is a client. We've made that representation. Frank is. We made that representation.

Did you ever have direct attorney-client relationship with Nancy Blumeyer?

THE WITNESS: With respect to Ms. Blumeyer, I don't recollect representing her on any specific matter although I did have discussion or discussions with her in the context of potential representation. I have not at this stage undertaken such representation.

MS. OHLMILLER: Q Were these discussions with Nancy Blumeyer before or after the close of business of Chicago Discount?

MR. BORAKS: Which discussions, the one about possible representation?

MS. OHLMILLER: The ones about possible representation.

MR. BORAKS: His position on that it is my view, and I so advise my client, is that discussions leading to the possibility of representation are covered by privilege even if representation does not ensure; and if I'm right about that—and I'm confident that I am—that when, where, and what was said as matters pertaining to these discussions are all confidential and cannot be disclosed. I think there is—the line is that you can—it's not privilege that such conversations took place, but anything else about the conversations, including when, where, and what context and what was said, is all privilege.

(*Id.* at 198-9).

* * *

[A-12] I Q [D]id you have any conversations with (CDCB employee) Tom Suba about Chicago Discount, or rather the operations of Chicago Discount?

A It's a very general question. I think the answer is yes.

Q Can you recall the subject matter covered in any of these discussions?

MR. BORAKS: We're getting into a problem area again. I don't have recent Supreme Court case, Upjohn or whatever it's called, but Mr. Weintraub has the same problem, same constraints I think under that case in terms of his discussions with company employees about company matters as he would with respect to any other aspect of the Attorney-Client privilege. That's my intrepretation of what that case stand for, so I don't think he has any discretion to waive that privilege.

(*Id.* at 201-2)

* * *

J (In regard to parties held at CDCB offices)

Q Those two parties, did they have a purpose?

A You mean what was the occasion?

Q Yes.

MR. BORAKS: Excuse me a minute.

(Witness consults with counsel.)

THE WITNESS: With respect to what I believe was the first of the two parties that I mentioned, I think the occasion was basically the first anniversary of the company under its head management. With respect to the second, I don't feel that I can answer the question consistent with the constraints of Attorney-Client privilege.

(*Id.* at 203-4)

* * *

[A-13] K MS. OHLMILLER: Q Was there discussion amongst people present at the party to the effect that Frank McGhee had made a million dollars trading commodities? I'm still talking about the first party.

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Q With regard to the second party, do you recall who was present?

A Again, I think the best answer I could give is most likely most of the employees and a number of outside people.

Q At the second party was there any discussion by any of the people present to the effect that Frank McGhee had made a million dollars trading commodities?

A I don't believe that I could answer that question consistent with the constraints of Attorney-Client privilege.

Q At the second party among the people present was there any discussion to the effect that Chicago Discount carried customer equity of several million dollars?

A I don't believe I could answer that question consistent with the constraints of Attorney-Client privilege.

(*Id.* at 206-7)

* * *

[A-14] L Q Can you explain the various arrangements that were made to purchase the company and fund it?

A I don't believe I can answer that question consistent with the constraints of Attorney-Client privilege.

(*Id.* at 208)

* * *

M (In reference to loan of $135,000 loaned by CDCB to two officers)

Q What were the circumstances surrounding those personal loans to the officers?

A I don't believe I could answer that question consistent with the constraints of Attorney-Client privilege.

(*Id.* at 209)

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N MS. OHLMILLER: Q Are you aware through any means of the purchase or sale of precious metals or coins through the Republic National Bank of New York?

A I don't believe I could answer that question consistent with the constraints of Attorney-Client privilege.

(*Id.* at 209-10)

* * *

[A-15] O (In regard to access to company safe, Respondent stated he had on occasion opened the safe so petty cash could be removed)

Q Could there have been any other reason that you opened the safe?

MR. BORAKS: I think I must be getting worn down here. I think I should have advised my client at the outset of this line of questioning that the policies regarding access to the safe and the procedures regarding it are secrets of his client which he is not authorized to disclose, so having been asleep at the switch when this line of questioning started, I think I'm going to have to advise Mr. Weintraub that he runs the risk of breaching his obligations by continuing to answer questions that go in that direction.

MS. HARVITT: Well, the line of questioning pertains to Mr. Weintraub's opening of the safe and his activity, not the activity of a principal of the firm or employees of the firm.

MR. BORAKS: Wait a minute. You asked him why he was granted access, which has to do with the decision made as to the policy of who gets access and why; and the questioning seems to be by way of follow-up to that question; and I think that even though he's already answered it, I think that the issue as to how the safe was handled, who had access, and why they had access and what they did with their access are questions that he should not be answering; so I'm going to advise him not to answer.

MS. HARVITT: Q Okay. Mr. Wintraub, do you refuse to answer that question on the basis of your counsel's advice?

A Based on the statement and advice of counsel, I decline to answer any question.

(*Id.* at 212-4)

UNITED STATES DISTRICT COURT FOR THE
NOTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CIVIL ACTION NO. 81 C 6996

In the Matter of An Application to
Enforce an Administrative Subpoena
of the

COMMODITY FUTURES TRADING COMMISSON, APPELLANT,

v.

GARY WEINTRAUB, RESPONDENT.

APPLICATION FOR AN ORDER TO SHOW CAUSE AND ORDER TO COMPEL ANSWERS TO QUESTONS

JURISDICTION AND VENUE

1. The Commodity Futures Trading Commission ("Commission") is an independent federal regulatory agency responsible for administering and enforcing the provisions of the Commodity Exchange Act, as amended ("Act"), 7 U.S.C. §§ 1 *et seq.*

2. The Commission brings this action pursuant to Section 6(b) of the Act, 7 U.S.C. § 15, and applies to this Court for the Order to Show Cause, in the form attached, requiring the Respondent Gary Weintraub to show cause why he should not be ordered by this Court to answer certain questions as required by a subpoena *duces tecum* issued by the Commission and duly served upon him, and for an Order Compelling Answers to Questions previously put to him to which he claimed a privilege.

3. Section 6(b) of the Act, 7 U.S.C. § 15, confers jurisdiction upon this Court to enforce an administrative subpoena issued by the Applicant Commission.

4. The subpoena *duces tecum* issued by the Commission to the Respondent required his appearance to testify and

produce documents at the Commission's offices in Chicago, Illinois.

RESPONDENT

5. Gary Weintraub ("Weintraub"), 1221 N. Dearborn Street, Chicago, Illinois 60610, has never been registered with the Commission in any capacity. Weintraub is an attorney who at various times has been associated, as counsel and otherwise, with Chicago Discount Commodity Brokers, Inc. ("CDCB"), a commodity brokerage firm which was registered with the Commission and which is now in bankruptcy. Weintraub maintained several commodity futures trading accounts with CDCB at various times during 1981.

RESPONDENT'S FAILURE TO COMPLY WITH AN ADMINISTRATIVE SUBPOENA AND TO PROVIDE ANSWERS TO QUESTIONS

6. On November 3, 1980, the Commission entered an Order entitled "In the Matter of Chicago Discount Commodity Brokers, Inc." pursuant to Section 6(b) of the Act, 7 U.S.C. § 15, designating various staff members of the Commission to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, require the production of any and all books, papers, correspondence, memoranda, records, and other tangible things relevant to an investigation being conducted pursuant to Sections 6(b) and 8(a) of the Act, 7 U.S.C. §§ 15 and 12(a), for the purpose of determining whether CDCB or any entity or person affiliated with, related to, or associated with said firm or persons have engaged in or are engaging in violations of Sections 4b, 4d, 4f, 4g, 6(b) and 9 of the Act, as amended, 7 U.S.C. §§ 6b, 6d, 6f, 6g, 9 and 13, and Regulations 1.10, 1.12, 1.17, 1.18 and 1.20 through 1.36 promulgated thereunder, 17 C.F.R. 1.10, 1.12, 1.17, 1.18, and 1.20 through 1.36 (1980), or in similar acts or practices in violation of any other provisions of the Act or the Regulations promulgated thereunder. The Order was amended on November 17 and December 29, 1980, and on October 14, November 6, and November 24, 1981, to designate additional staff members as officers to issue subpoenas and to take testimony. (A

copy of the Order and the Amendments are attached hereto as Exhibit A).

7. Acting under the November 3, 1980, Order and amendments, a Commission staff member issued an administrative subpoena *duces tecum* to Weintraub on January 28, 1981. (A copy of the subpoena *duces tecum* is attached hereto as Exhibit B). Weintraub appeared in the Chicago offices of the Commission on January 26 and 27, 1981, and again on August 26, 1981, to testify in the administrative investigation.

8. During the testimony given on February 26 and 27, 1981, Weintraub, represented by counsel testified, first as to his legal representation of CDCB, and second, as to his personal business relationship with CDCB. As to his legal relationship with CDCB, Weintraub explained that he had acted as counsel for CDCB and its principals both as an associate of the law firm of Jann, Carroll, Kruse, Sain & Dolin and as in-house counsel at CDCB after leaving the firm in August, 1980. As to his personal business relationship with CDCB, Weintraub testified that he had had three personal commodity trading accounts at CDCB, that he personally had received a loan or gift of $18,950 from CDCB for the purchase of a seat on the Mid-America Commodity Exchange, and that the possibility that he would trade for CDCB had been contemplated when that seat was purchased. (*See* Weintraub Deposition of February 27 at page 88, attached hereto as Exhibit C). Weintraub did not assert the Attorney-Client privilege on either February 26 or 27.

9. On August 26, 1981, Weintraub returned to the Commission's Chicago office for the continuation of his deposition. Weintraub was at that time represented by new counsel, Robert A.W. Boraks ("Boraks"). Prior to the recommencement of Weintraub's testimony, Boraks stated that "Weintraub had an Attorney-Client relationship with Chicago Discount Commodity Brokers and one of its principals" and that "[a]t least one of Chicago Discount's principals has made it absolutely plain to Mr. Weintraub that he has every intention and desire to assert the full measure of whatever constraints there might be on Mr. Weintraub be-

cause of his professional relationship with this person; and those instructions have to be obeyed, in my judgment;" (*See* Weintraub Deposition of August 26, 1981, at page 130, attached hereto as Exhibit D). Boraks did not identify the CDCB principal on whose behalf the privilege was thus asserted. Boraks additionally referred to Canon 4-101 of the Illinois Supreme Court's Code of Professional Responsibility which, he asserted, extends the Attorney-Client privilege to "secrets", *e.g.*, information which, though not "confidential," could prove "embarrassing" or "detrimental" to the client. (*See* Exhibit D at page 131.)

10. Thereafter Weintraub and his counsel, Boraks, raised the Attorney-Client privilege and the Ethical Canon as bars to answering the following questions:

[6] (Referring to an October 20, 1980, deposit of $20,798.05 in Weintraub Account 00150)

Q Did you deposit that amount into that account on that date?

A No.

Q Do you know if anyone deposited that money in that account on that date?

(Discussion off the record.)

MR. BORAKS: Could I request reading back of that last question?

(Question read.)

MR. BORAKS: I think that we've reached the first point in time where we have a bit of a snag, whether Mr. Weintraub knows that and the circumstances of whatever knowledge he has is related to confidential communications between him and a client; and unfortunately, I just don't think he can answer that question.

MS. OHLMILLER: All right. Can we have him assert the privilege for the record?

MR. BORAKS: Sure, sure.

THE WITNESS: I would like to answer the question, but I feel that, consistent with Attorney-Client privilege constraints with which I'm faced, that I cannot answer the question unless authorized to do so by client or clients.

(August 26, 1981 Dep. at 148-9)

* * *

Q Did you make any inquiry into the entry?

A Yes.

Q To whom did you make the inquiry?

A I don't think I could answer that question consistent with the rights and privileges of clients and feel constrained to assert the client's privilege.

(*Id.* at 150)

* * *

[7] B. (Referring to an October 20, 1980, deposit of $31,657 in Weintraub Account 00151)

Q Did you deposit this amount in this account on or about that date?

A No, I did not.

Q Do you know if a deposit was made on that date in that amount?

A For the same reasons as with respect to the last statement that you showed me, I believe I must assert the privilege of the client with respect to that question, and perhaps to save some time, I think that's also going to be true with respect to 00152—

MR. BORAKS: Why don't you let her do it by the numbers?

THE WITNESS: Okay, I'm sorry.

MS. OHLMILLER: Q Do you know who was responsible for that entry?

A I believe I must also assert the privilege of the client with respect to that question, also.

(*Id.* at 151)

* * *

Q When did you first become aware of this entry? We're still talking about in Account 00151.

A My recollection, as I sit here, is that it would have been when I received the statement.

Q Did you make any inquiry into the entry of concerning the entry?

A The inquiry would have been the same inquiry that I mentioned a moment ago.

Q Okay, and to whom was that inquiry directed?

A I don't believe that I can answer that question consistent with the rights and privileges of client or clients.

(*Id.* at 151-2)

* * *

[8] C. (Referring to an October 20, 1980, deposit of $31,468.50 into Weintraub Account 00152)

Q Did you deposit that amount in that account on that date?

A No.

Q Do you know if anyone deposited that amount in this account on that date?

A I believe that I must assert the rights and privileges of client or clients with respect to that question.

* * *

Q Did you authorize this entry or approve of this entry in any fashion?

A No.

Q When you first learned of the entry, did you question anyone about it?

A Yes.

Q And when would that have been?

A My recollection is that it was a day or several days after the date of the statement.

Q And it would have been the statement that you questioned the entries in the Account 00150 and 00151?

A Yes.

Q And to whom did you direct that inquiry?

A Consistent with the rights and privileges of client or clients, I don't believe I could answer that question.

(*Id.* at 153-4)

* * *

[9] D. (In reference to respondent's access to CDCB safe deposit boxes)

Q What was the purpose of going to the safe deposit box on those occasions?

A To place—

MR. BORAKS: One second.

(Witness consults with counsel.)

THE WITNESS: Could you read back the question.

(Question read.)

THE WITNESS: I believe I must assert the rights and privileges of client or clients with respect to that particular question.

(*Id.* at 159-60)

* * *

E. Q Was there any discussion with Frank McGhee as to your duties and responsibilities as attorney for the corporation?

A I think I must assert the Attorney-Client privilege with respect to that question.

(*Id.* at 182)

* * *

[10] F. Q Was there ever a discussion with Frank McGhee as to the number of hours that you would work on business pertaining to Chicago Discount Commodity Brokers after August of 1980?

MR. BORAKS: I'm sorry, could you read that question back?

(Question read.)

MR. BORAKS: Off the record.

(Discussion read).

THE WITNESS: I feel constrained to assert Attorney-Client privilege with respect to that question. Also, I must decline to answer unless authorized by the client to do so.

(*Id.* at 182-3)

* * *

G. Q Did Ms. Blumeyer have a personal relationship with Frank McGhee?

A I feel constrained to assert the Attorney-Client privilege with respect to that particular question and must decline to answer unless otherwise directed by client.

(*Id.* at 197)

* * *

[11] H. Q Do you know if Ms. Blumeyer had commodity accounts at Chicago Discount?

A I believe that she did.

Q Upon what do you base that belief?

A As I sit here today, I'm really not sure of the source of that belief, and I'm reluctant to get into that since the

source of that belief may be within the matters covered by privilege, Attorney-Client privilege.

MS. HARVITT: What grounds are you asserting the privilege, the Attorney-client privilege?

MR. BORAKS: What if Frank McGhee told him that?

MS. HARVITT: It's unclear to me whether or not Nancy Blumeyer is the client or McGhee is the client or CDCB is that client. That's all I'm trying to establish.

MR. BORAKS: Well, CDCB is a client. We've made that representation. Frank is. We made that representation.

Did you ever have direct attorney-client relationship with Nancy Blumeyer?

THE WITNESS: With respect to Ms. Blumeyer, I don't recollect representing her on any specific matter although I did have discussion or discussions with her in the context of potential representation. I have not at this stage undertaken such representation.

MS. OHLMILLER: Q Were there discussions with Nancy Blumeyer before or after the close of business of Chicago Discount?

MR. BORAKS: Which discussions, the one about possible representation?

MS. OHLMILLER: The ones about possible representation.

MR. BORAKS: His position on that it is my view, and I so advise my client, is that discussions leading to the possibility of representation are covered by privilege even if representation does not ensure; and if I'm right about that—and I'm confident that I am—that when, where, and what was said as matters pertaining to these discussions are all confidential and cannot be disclosed. I think there is—the line is that you can—it's not privilege that such conversations took place, but anything else about the conversations, including when, where, and what context and what was said, is all privilege.

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Q Those two parties, did they have a purpose?

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Q Yes.

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(Witness consults with counsel.)

The WITNESS: With respect to what I believe was the first of the two parties that I mentioned, I think the occasion was basically the first anniversary of the company under its head management. With respect to the second, I don't feel that I can answer the question consistent with the constraints of Attorney-Client privilege.

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[14] L. Q Can you explain the various arrangements that were made to purchase the company and fund it?

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Q What were the circumstances surrounding those personal loans to the officers?

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[15] O. (In regard to access to company safe, Respondent stated he had on occasion opened the safe so petty cash could be removed)

Q Could there have been any other reason that you opened the safe?

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MS. HARVITT: Q Okay. Mr. Weintraub, do you refuse to answer that question on the basis of your counsel's advice?

A Based on the statement and advice of counsel, I decline to answer any question.

(*Id.* at 212-4)

11. Weintraub's use of the Attorney-Client privilege is inappropriate in each of the above instances and constitutes an abuse of that privilege. The Attorney-Client privilege cannot be used as a subterfuge to thwart legitimate access to information sought in an administrative investigation.

12. The testimony and documents requested of Weintraub are currently not in the possession of the Commission and are relevant to the Commission's private investigation to determine whether there have been violations of the Act. (*See* Affidavit of Charlotte A. Ohlmiller filed herewith as Exhibit E).

13. The relief requested herein has not been previously requested of this or any other Court or tribunal.

RELIEF

WHEREFORE, the Commission respectfully requests that this Court:

(1) Enter on Order to Show Cause requiring Respondent Weintraub to appear before the Court on a date to be fixed and to show cause, if any, why he should not be compelled to comply with the subpoena served upon him by answering certain questions which he refused to answer;

(2) Enter an order requiring obedience to the Administrative Subpoena directing Weintraub to appear, give testimony in answer to questions listed in this motion; and

(3) Grant such other and further relief as may be just and proper under the circumstances.

Respectfully submitted,

/s/ Constantine J. Gekas
CONSTANTINE J. GEKAS
Regional Counsel

/s/ Susan N. Sekuler
SUSAN N. SEKULER

/s/ Andrianne S. Harvitt
ADRIANNE S. HARVITT

Attorneys for Applicant
Commodity Futures Trading Commission
233 South Wacker Drive, Suite 4600
Chicago, Illinois 60606
(312) 353-6623

Dated: DECEMBER 15, 1981

LIST OF EXHIBITS

EXHIBIT A—Order and Amendments.

EXHIBIT B—Subpoena *Duces Tecum*, January 28, 1981.

EXHIBIT C—Weintraub Deposition of February 27, 1981, page 88.

EXHIBIT D—Weintraub Deposition of August 26, 1981, pages 130-132, 148-154, 159-169, 180-183, 191-214.

EXHIBIT E—Affidavit of Charlotte A. Ohlmiller.

NOTE: The above exhibits are being filed under a protective order for the review of judicial personnel only.

CERTIFICATE OF SERVICE

This is to certify that a copy of the afore-mentioned Notice of Filing and accompanying Application was mailed to the party listed below this 15th day of December, 1981.

Robert A.W. Boraks, Esq.
2000 L Street, N.W.
Washington, D.C. 20036

/s/ Adrianne S. Harvitt
ADRIANNE S. HARVITT
Attorney for
Commodity Futures Trading Commission

EXHIBIT A

COMMODITY FUTURES TRADING COMMISSION
233 SOUTH WACKER DRIVE, SUITE 4600, CHICAGO IL 60606

March 5, 1982

John K. Notz, Jr., Esq.
Interim Trustee
4600 One First National Plaza
Chicago, Illinois 60603

Dear Mr. Notz:

As the interim trustee for the debtor-corporation Chicago Discount Commodity Broker, Inc. ("CDCB"), you are undoubtedly aware that former officers of CDCB have at various times asserted an attorney-client privilege on behalf of CDCB and themselves as officers of CDCB. As a result of the officers' assertion of the corporate privilege, the former general counsel for CDCB, Gary Weintraub, has refused to testify in the CFTC's administrative proceedings concerning certain corporate policies, corporate transactions, and various acts of, or communications with, corporate employees, agents, and officers, notably Frank H. McGhee. Consequently, the CFTC has instituted an action in the United States District Court for the Northern District of Illinois (*CFTC* v. *Weintraub*, No. 81 C 6996, filed December 15, 1981) to compel Mr. Weintraub's testimony regarding such matters.

The CFTC has taken the position in its pleadings that the matters to which Mr. Weintraub refuses to testify are simply not covered by an attorney-client privilege for various enumerated reasons. (Enclosed is a copy of the CFTC's brief filed in connection with this matter). Nevertheless, we consider this to be the appropriate time to raise with you the issue of the ability of a former corporate officer to even assert an attorney-client privilege on behalf of a bankrupt corporation in the process of liquidation. In light of recent case law, it is the CFTC's position that neither Frank McGhee nor any other former officer, director, or employee

of the debtor-corporation has the ability to assert an attorney-client privilege at this time on behalf of the corporation for communications pertaining to corporate operations. *See In Re O.P.M. Leasing Services, Inc.*, 13 B.R. 54, *aff'd*, 13 B.R. 64 (S.D.N.Y. 1981), *aff'd*, Bank. L. Rep. (CCH) ¶ 68,497 (2d Cir. 1982). *Citibank, N.A.* v. *Andros*, Bank. L. Rep. (CCH) ¶ 68,505 (8th Cir. 1981). Instead, the CFTC believes that the ability to assert an attorney-client privilege on behalf of CDCB lies with you as the interim trustee for the debtor-corporation.

For over a year now, the CFTC has been diligently attempting to locate missing customer funds and determine the causes for CDCB's bankruptcy. Since the CFTC's effort to reconstruct the daily business operations of the debtor-corporation has now been frustrated by the refusal of Mr. Weintraub to testify, we now consider it appropriate to ask you as interim trustee to waive the attorney-client privilege on behalf of CDCB. We deem such a waiver to be in the best interests of the creditors of CDCB as well as the corporate debtor.

Since the court will be considering the merits of the CFTC's action very shortly, your immediate attention to our request would be greatly appreciated.

Sincerely,

/S/ CONSTANTINE J. GEKAS
CONSTANTINE J. GEKAS
Regional Counsel

CJG/prl

cc: David F. Heroy, Esq.
Gardner Carton & Douglas
One First National Plaza
Suite 4600
Chicago, Illinois 60603

CHICAGO DISCOUNT COMMODITY BROKERS INC.
175 West Jackson Blvd., Chicago, Illinois 60604
(312) 922-5888

March 11, 1982

Constantine J. Gekas, Esq.
4600 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606

Re: *Chicago Discount Commodity Brokers, Inc.*

Dear Mr. Gekas:

I have received your letter dated March 5, 1982 with respect to the attorney/client privilege held by the above-named debtor. As Interim Trustee for this debtor I hereby waive any interest I have in the attorney/client privilege possessed by that debtor for any communications or information occurring or arising on or before October 27, 1980. This waiver specifically does not apply to the relationship between me and my attorneys of Gardner, Carton & Douglas.

Very truly yours,

/S/ John K. Notz, Jr.
JOHN K. NOTZ, JR.
Interim Trustee

JKN/do

cc: David F. Heroy

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Presiding Judge, Honorable Nicholas J. Bua

Cause No. 81 C 6996 Date June 30, 1982

COMMODITY FUTURES TRADING COMMISSION

v.

WEINTRAUB

MOTION TO INTERVENE

The rule of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel

Irwin G. Jann and James W. Stephenson
Jann, Carroll, Sain & Dolin, Ltd.
55 East Monroe Street—Suite 4444
Chicago, Illinois 60603

Representing

Intervenors, Frank H. McGhee and Andrew McGhee

Names and Addresses of other counsel entitled to notice and names of parties they represent.

Constantine J. Gekas and Andrianne S. Harvitt
Commodity Futures Trading Commission
233 South Wacker Drive
Room 4600
Chicago, Illinois 60606
Representing Applicant

Boraks and Leckar
2000 L Street, N.W.
Suite 200
Washington, D.C. 20036
Representing Respondent

Frank H. McGhee and Andrew McGhee given leave to intervene. Applicant, C.F.T.C., to file answer to motions to vacate or modify order of June 9, 1982 by July 12, 1982, and respondents to reply by July 19, 1982.

UNITED STATES DISTRICT COURT FOR
THE NORTH DISTRICT OF ILLINOIS

Docket No. 83 CR 262-1
UNITED STATES OF AMERICA

v.

FRANK MCGHEE

JUDGMENT AND PROBATION COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date, 10-7-83.

X With Counsel, Edward Genson

PLEA X GUILTY, and the court being satisfied that there is a factual basis for the plea,

There being a finding of GUILTY.

Defendant has been convicted as charged of the offense(s) of knowingly, willfully and unlawfully embezzling customer funds which were received by CDCB to margin, guarantee and secure the trades and contracts of customers and accruing to such customers as the results of such trades and contracts IN VIOLATION OF TITLE 7, UNITED STATES CODE, SECTION 13(a) as charged in Counts 25, 26, and 27.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, he court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE (3) YEARS on count 25.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) YEARS on each of counts 26 and 27 to run concurrently with each other and consecutively to count 25. The execution of said sentence of imprisonment on counts

26 and 27 is hereby suspended and defendant placed on probation for a period of FIVE (5) YEARS on condition that he comply with he general conditions of probation and the following special condition: 1) defendant shall use his best efforts to make restitution to the customers of the Chicago Discount Commodities Brokers, Inc.

IT IS FURTHER ORDERED that the defendant report to the designated institution by November 21, 1983.

IT IS FURTHER ORDERED on government's oral motion, remaining counts are hereby dismissed. Same bond to stand pending surrender.

Condition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommend.

/s/ John A. Nordberg
JOHN A. NORDBERG

OCTOBER 7, 1983

Supreme Court of the United States

No. 84-261

COMMODITY FUTURES TRADING COMMISSION, PETITIONER

v.

GARY WEINTRAUB, ET AL.

ORDER ALLOWING CERTIORARI. Filed October 29, 1984.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

(7)

NO. 84-261

In the

Supreme Court of the United States

OCTOBER TERM, 1984

COMMODITY FUTURES TRADING COMMISSION,

Petitioner,

vs.

GARY WEINTRAUB, ET AL.

Respondents.

MOTION OF JOHN K. NOTZ, JR., TRUSTEE, FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER COMMODITY FUTURES TRADING COMMISSION

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Dated: December 13, 1984

CHAS. P. YOUNG COMPANY

TABLE OF CONTENTS

NO. 84-261

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MOTION OF JOHN K. NOTZ, JR., TRUSTEE, FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER COMMODITY FUTURES TRADING COMMISSION

John K. Notz, Jr., Trustee for the Chicago Discount Commodity Brokers, Inc. ("CDCB"), respectfully moves for leave to file BRIEF OF JOHN K. NOTZ, JR., TRUSTEE, AS AMICUS CURIAE IN SUPPORT OF PETITIONER COMMODITY FUTURES TRADING COMMISSION, instanter. The grounds for this motion are set forth below in accordance with Rule 36.3 of the Rules of the Supreme Court.

I. INTRODUCTION

John K. Notz, Jr., Trustee (the "Trustee"), has requested consent to the filing of an *amicus curiae* brief in support of petitioner Commodity Futures Trading Commission ("CFTC") from both petitioner CFTC and respondents Frank

H. McGhee and Andrew McGhee. The CFTC has clearly consented, but Respondents have given a conditioned consent, so that it is not clear whether they consent to the filing of the instant *amicus curiae* brief. The Trustee, therefore, seeks leave of court to file the instant *amicus curiae* brief.

II. STATEMENT OF INTEREST

The issue presented in this case is whether a Chapter 7 bankruptcy trustee has the power to claim or waive a corporate debtor's pre-petition attorney-client privilege. The Trustee is the Chapter 7 bankruptcy trustee for the corporate debtor CDCB and it is his waiver of CDCB's pre-petition attorney-client privilege that is at issue here. The decision below has had a significant impact on the Trustee's ability to discharge his duties to CDCB's Chapter 7 estate and will have a similar impact on other bankruptcy trustees for corporate debtors.

III. FACTS AND ARGUMENTS THAT HAVE NOT BEEN ADEQUATELY PRESENTED AND THEIR RELEVANCY TO THE DISPOSITION OF THIS CASE

The issue of whether a bankruptcy trustee has the power to assert or waive the pre-petition attorney-client privilege of a corporate debtor is presented here in the unusual context of a CFTC enforcement action. While the Trustee is not a party to this action, the resolution of the issue will likely have its greatest impact on bankruptcy trustees, such as the Trustee here. A trustee under Chapter 7 of the Bankruptcy Code is required to collect and reduce to money the assets of the estate and to close up the estate as expeditiously as is compatible with the best interests of parties in interest. 11 U.S.C. § 704. Because the property of the estate includes causes of action which belong to the debtor when the petition is filed, 11 U.S.C. § 541; 4 *Collier On Bankruptcy*, ¶541.10 (15th Ed. 1984), the trustee is required to investigate and prosecute these actions for the benefit of the estate. The Trustee's experience in the administration of the CDCB estate has

demonstrated that the right to control the attorney-client privilege is a right that bankruptcy trustees must have in order to fulfill their statutory duty to investigate and prosecute actions on behalf of the debtor's estate. This argument has not been adequately presented by the parties below and will probably not be adequately presented here.

The particular facts and circumstances leading to the waiver at issue here are relevant to the disposition of this case, especially in light of Respondents' characterization of these facts. Respondents Frank and Andrew McGhee have argued by implication and innuendo that there was something improper about the Trustee's waiver of CDCB's pre-petition attorney-client privilege. *See, e.g.*, Brief of Respondents In Opposition To The Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit, pp. 2-3, 6, 19–20; Answer To Petition For Rehearing, pp. 1, 6-7; Brief Of Intervening Respondent/Appellants, pp. 15, 24, 25. Because the Trustee is most familiar with the facts and circumstances leading to his waiver, he is best able to present these facts to the Court in response to Respondents' characterizations. These facts have not been adequately presented by the parties and would probably not be adequately presented here.

Respectfully submitted,

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STATEMENT OF INTEREST

John K. Notz, Jr., Trustee (the "Trustee") incorporates by reference herein the Statement Of Interest and Facts And Arguments That Have Not Been Adequately Presented And Their Relevancy To The Disposition Of This Case set forth in parts II and III, respectively, of his Motion For Leave To File Brief As Amicus Curiae which immediately precedes and is bound together with this brief.

ARGUMENT

The Trustee previously filed a brief in support of the Commodity Futures Trading Commission's ("CFTC") Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit. In that brief the Trustee argued that, based on his experience in CDCB's Chapter 7

liquidation proceeding, bankruptcy trustees must have the right to control the pre-petition attorney-client privilege of the debtor corporation. The Trustee further argued that the holding below would allow dishonest management to protect itself from personal liability to the estate as the CDCB "insiders" have attempted to do here. These arguments, as more fully presented in the Trustee's prior brief, are incorporated herein as arguments on the merits. The Trustees also adopts the arguments submitted by the CFTC in its briefs before this Court. The following is submitted in addition to all of those arguments.

The Trustee's Waiver Of CDCB's Pre-Petition Attorney-Client Privilege Was In The Best Interests Of CDCB's Chapter 7 Estate

Respondents Frank and Andrew McGhee have argued by implication and innuendo that there was something improper about the Trustee's waiver of CDCB's pre-petition attorney-client privilege. They depict the Trustee as an unthinking pawn in a scheme by the CFTC to circumvent the privilege.[1]

Contrary to this characterization, the Trustee initially sought to preserve the privilege as an asset of CDCB's Chapter 7 estate. The Trustee later sought information that Weintraub refused to disclose on the basis of the CDCB's attorney-client privilege. Upon Weintraub's refusal to divulge that information, it became in the best interests of CDCB's Chapter 7 estate for the Trustee to waive the privilege.

The Trustee first became involved with the affairs of CDCB on October 27, 1980, when he was appointed Receiver for CDCB by United States District Court Judge James B.

[1] *See, e.g.*, Brief of Respondents In Opposition To The Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit, pp. 2–3, 6, 19–20; Answer To Petition For Rehearing, pp. 1, 6–7; Brief Of Intervening Respondent/Appellants, pp. 15, 24, 25.

Moran in case No. 80 C 5755 in the Northern District of Illinois, Eastern Division (the "Civil Proceeding"). The CFTC had filed a complaint against CDCB, alleging various violations of the Commodity Exchange Act. The Trustee was appointed Receiver pursuant to an order (the "Consent Order") which authorized him to take custody and control of all of CDCB's assets and assume all of CDCB's powers to manage and control these assets. R. Supp., Ex. 1. Included was a specific authorization to file a voluntary petition for liquidation on behalf of CDCB under Chapter 7 of the Bankruptcy Code. *Id.* Frank McGhee, acting as the sole director and officer of CDCB, agreed in writing to the entry of the Consent Order. J.A. 17.

On November 3, 1980, the CFTC conducted a deposition of Weintraub. Appendix To Amicus Curiae Brief of John K. Notz, Jr., Trustee (the "Amicus Appendix"), p. 108.[2] At that deposition, the Trustee, then acting as Receiver, expressly reserved the right to assert CDCB's attorney-client privilege in connection with Weintraub's legal services to CDCB. Amicus Appendix, p. 109-110.

On November 4, 1980, the Trustee, then acting as Receiver, filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code on behalf of CDCB. *In re Chicago Discount Commodity Brokers, Inc.*, No. 80 B 14472 (Bankr. N.D. Ill.). *See also* Pet. App. 2a. The Trustee became CDCB's Chapter 7 trustee and discharged his duties to discover the assets of the estate and to investigate possible claims. As part of his investigation into possible claims, the Trustee examined Weintraub pursuant to Rule 205 of the then-applicable Rules of Bankruptcy Procedure on November 17 and December 16, 1981 In that examination Weintraub refused to produce documents and refused to answer questions, asserting

[2] The Amicus Appendix was filed by the Trustee in the Court of Appeals for the Seventh Circuit as an addendum to the Brief Of John K. Notz, Jr., Trustee, As Amicus Curiae In Support Of The Petition Of The Commodity Futures Trading Commission For Rehearing With Suggestion That Rehearing Be *En Banc*.

CDCB's pre-petition attorney-client privilege. Amicus Appendix, pp. 5–41. *See also* Brief of John K. Notz, Jr., Trustee, As Amicus Curiae In Support Of The Petition Of The Commodity Futures Trading Commission For Rehearing With Suggestion That Rehearing Be *En Banc*, p. 3.

By the time the Trustee completed his examination of Weintraub on December 16, 1981, the CFTC had initiated an action to compel Weintraub to answer questions which it had posed to him in a deposition pursuant to an investigatory subpoena.[3] In view of the already pending CFTC action, a separate proceeding by the Trustee against Weintraub would have been a duplicative and unnecessary administrative expense of CDCB's Chapter 7 liquidation proceeding.

On March 6, 1982, the CFTC requested that the Trustee waive CDCB's attorney-client privilege "in the best interests of the creditors of CDCB as well as the corporate debtor." J.A. 48. On March 11, 1983, the Trustee waived any interest which he may have had in the attorney-client privilege of CDCB for any pre-petition communications. J.A. 49.

The Trustee's waiver of CDCB's pre-petition attorney-client privilege was in the best interests of CDCB's Chapter 7 estate. It served those interests by assisting the investigation of the pre-petition operations of CDCB while conserving the resources of CDCB's estate. Furthermore, the Trustee's waiver of the privilege was hardly inevitable. To the contrary, the Trustee had asserted his right to claim the privilege against the CFTC during its questioning of Weintraub.

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[3]The CFTC filed its subpoena enforcement action on December 15, 1981. J.A. 33-36.

CONCLUSION

For the foregoing reason, John K. Notz, Jr., as Trustee for the debtor Chicago Discount Commodity Brokers, Inc., respectfully requests that the decision of the United States Court of Appeals for the Seventh Circuit be reversed.

Respectfully submitted,

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GARY WEINTRAUB, et al.,

Respondents.

BRIEF OF RESPONDENTS FRANK H. McGHEE AND ANDREW McGHEE

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54

QUESTIONS PRESENTED

1. Whether a trustee in bankruptcy has the power to assert or waive the bankrupt's attorney-client privilege, with respect to privileged communications antedating the filing of the bankruptcy petition?

2. If so as a general matter, whether a trustee of a corporation in bankruptcy may waive the corporation's attorney-client privilege, with respect to privileged pre-bankruptcy communications, despite the opposition of a stockholder and of the sole director?

3. If so as a general matter, whether a trustee in bankruptcy may, consistent with his fiduciary obligations, waive his debtor's attorney-client privilege, with respect to all pre-bankruptcy communications: (i) for the purpose of facilitating a government investigation, (ii) where the government is adverse to the bankrupt and is empowered to seek sanctions, including financial penalties, against the bankrupt, and (iii) blindly, without consideration of the potential impact of disclosure on the estate (because, *inter alia,* the trustee is unaware of the contents of the privileged communications to the bankrupt's former attorney which are sought to be disclosed)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTES AND RULES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATEMENT OF THE CASE

This subpoena enforcement action was brought by the Commodity Futures Trading Commission (the "CFTC") to compel Gary A. Weintraub, an attorney, to answer twenty-three questions to which he had asserted the attorney-client privilege of his former client and Canon 4, Rule 4-101, of the Illinois Code of Professional Responsibility (79 Ill.2d XXV, XLIV-XLV (1980)).

In response to the subpoena, Mr. Weintraub had testified on three days (February 26 and 27, and August 26, 1981). He answered approximately 800 questions. After his testimony in the CFTC investigation of his former client, Chicago Discount Commodity Brokers, Inc. ("CDCB"), the CFTC brought this action to compel Weintraub to disclose the privileged matters.[1] Then as now, CDCB was in bankruptcy.

On March 5, 1982, six months after Mr. Weintraub's last examination, and two months after this enforcement action was filed, the CFTC requested CDCB's interim bankruptcy trustee, John K. Notz, Jr.,[2] to waive CDCB's attorney-client privilege:

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[1] The CFTC subpoena also sought production of documents, which were produced by Mr. Weintraub without assertion of any privilege. Accordingly, this case involves no issue concerning documents.

[2] On the CFTC's recommendation, Mr. Notz had been appointed as equity receiver of CDCB. (J.A., 18-21.) Mr. Notz then filed a voluntary petition in bankruptcy (Chapter 7) on behalf of CDCB, and was appointed interim trustee and eventually permanent trustee for CDCB by the bankruptcy court. The bankruptcy court also approved independent counsel for CDCB as debtor (J.A., 23) and struck the appearance of the trustee's counsel as attorney for the debtor corporation itself (J.A., 24).

> [W]e . . . ask you as interim trustee to waive the attorney-client privilege on behalf of CDCB. We [i.e., the CFTC] deem such a waiver to be in the best interests of the creditors of CDCB as well as the corporate debtor.
>
> J.A., 47-48

On March 11, the trustee responded to the CFTC:

> As Interim Trustee [for CDCB] I hereby waive any interest I have in the attorney-client privilege possessed by that debtor for any communications or information occurring or arising on or before October 27, 1980.
>
> J.A., 49

Beyond the trustee's letter (granting an unlimited, unconditional waiver without explanation), the record is silent as to any reasons or "considerations" by the trustee. Despite the trustee's after-the-fact effort dehors the record to justify his blanket waiver, the only reason was the CFTC request.[3]

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[3] Neither at the time of the "waiver", nor in the bankruptcy court, nor in the district court, was any showing made of any reason for the waiver, or that the trustee gave any consideration to the potential effects of the solicited disclosures On rehearing in the Court of Appeals, the trustee first claimed (without even a supporting affidavit (see *United States* v. *Anderson*, 481 F.2d 685, 702 n19 (4th Cir. 1973)) that he had "decided that the best interests of the CDCB estate would be advanced by waiving the privilege" (Trustee's Amicus Br. on Rehearing, 7th Cir., 1). In this Court, the trustee does *not* say that he *determined* the waiver would be in the estate's interest. He says instead that the waiver was (in retrospect) in the estate's best interest, based on his opinion that the waiver "assist[ed] the investigation . . . of CDCB [operations]" and "conserv[ed] the [estate's] resources." (*Id.*, at 4.) However, the trustee was not privy to the investigation which he "assisted" (Pet. Br., at 6, n3), and the waiver has not resulted in disclosures of privileged matters from Mr. Weintraub.

(Continued on following page)

This enforcement action was argued to a magistrate (Carl B. Sussman), who held (i) the disputed matters were privileged, and (ii) Mr. Weintraub had properly asserted the attorney-client privilege, but (iii) nonetheless directed Weintraub to answer the disputed questions on the basis of the trustee's subsequent "waiver." Mr. Weintraub filed objections in the district court (R. 27). The CFTC did not appeal from the magistrate's holdings that the privilege applied and had been properly asserted.

Respondents, Frank H. McGhee, the sole officer and director of the corporation, and Andrew McGhee, a stockholder of the corporation (722 F.2d at 339; *See* Pet. App., 14a), were granted leave to intervene by the district court (J.A., 50-51), and also opposed the magistrate's order.[4]

(Continued from previous page)

Respondents have pointed out that the trustee's waiver was given without knowledge of the attorney-client communications involved (Res. Br. Opp. Cert., 3 n.). The Government and the trustee have never disputed this. The trustee could not have determined whether disclosure was in the estate's best interests.

Moreover, the trustee's "waiver" blanketed all pre-petition confidences. The trustee was clearly in no position to know what exposure might result to the corporation from disclosure of privileged matters since CDCB's founding. (Mr. Notz was careful, however, to exclude any waiver of his own attorney-client privilege as trustee. J.A. 49.)

[4] The Government's suggestion that Respondents failed to preserve their right to challenge the trustee's "waiver" of CDCB's privilege (Pet. Br., 6 n10) is wrong (and apparently overlooks the fact that Respondents first intervened in this proceeding in the district court). In their pleading following their intervention, Respondents noted their position:

> Intervenors have asserted, and continue to assert, to the fullest extent of their authority, all attorney-client privileges and all Rule 4-101 privileges belonging to CDCB. They have so advised Respondent, as well as other attorneys who represented CDCB.
>
> R. 49, at 6

The district court (Nicholas J. Bua, J.) affirmed, but later clarified that "Respondent [Weintraub] shall respond to the . . . questions . . . without asserting an attorney-client privilege *on behalf of* [*CDCB*]" (Pet. App., 17a, 17b) (emph. added).[5]

Respondents McGhee appealed the district court's orders to the Seventh Circuit (R. 54). Mr. Weintraub did not appeal. The CFTC did not cross-appeal as to the application of the privilege or its assertion.

The Seventh Circuit reversed, holding that the trustee could not waive his debtor's privilege under the circumstances presented. The CFTC, joined by several *amici* including the trustee, petitioned the Court of Appeals for rehearing and for rehearing *en banc*. The Seventh Circuit modified its original opinion, principally in response to the parties' additions to the record which that court allowed, but the panel adhered to its conclusion and judgment. Rehearing and rehearing *en banc* were denied: no judge of the Seventh Circuit requested a vote (Pet. App. 21a-22a.)

This Court granted certiorari on October 29, 1984 (J.A. 54).

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[5] The magistrate had ordered Weintraub to "respond to the various questions . . . [of the CFTC] without asserting *an* attorney-client privilege" (Order of April 26, 1982; R. 25) (emphasis added).

SUMMARY OF ARGUMENT

The bankruptcy laws neither grant nor support the proposed power of bankruptcy trustees to waive their debtors' attorney-client privilege. Trustee waivers are contrary to the congressional pronouncements on privilege and historical understanding of the applicability of privileges in bankruptcy, even as against trustees themselves. Trustee "waivers" were never contemplated by Congress.

The Government's "management" theory, adopted by only one district judge, is a spurious effort to rationalize the inference of a power which Congress has never granted (or considered) into the complex of specific trustee powers which it has. This approach is inconsistent with the Bankruptcy Code, and ultimately just a variation of the "property" theory (evidentiary privileges are debtors' property), which the Government itself largely abandons. Like the "property" theory (followed by most of the courts allowing trustee waivers), the "management" theory does not apply selectively to corporations, thus allowing trustee "waivers" of individual debtors' privileges, as lower courts indeed have done.

The Government relies on the identity of bankruptcy trustees with their bankrupts, which is untrue both legally and practically. Bankruptcy trustees are elected by the debtor's creditors, or picked by governmental authorities, as here. Their duties and loyalties, like their objectives and goals, are fundamentally different than those of the debtor (the stockholders in corporate bankruptcies), with whom trustees are often in direct conflict. Bankruptcy trustees, as agents of the creditors, make different decisions than corporate management, the agent of the owners

—and the sole party available in bankruptcy to represent the interests of corporate ownership.

The only justification offered for the extraordinary power to compel attorneys to divulge privileged confidences to government authorities (as here) or to creditors (as results) is the discovery of suspected insider fraud—a justification that applies equally in individual bankruptcies.

Existing exceptions to the attorney-client privilege, together with the availability of numerous alternative sources of unprivileged information (sources other than the attorney) refute the claimed "need" for trustees themselves to invade the privilege, just as does the historical absence of such authority until the recent contrivance of the "waiver" theory. The "need" to discover fraud provides no justification for trustee "waivers" in any event.

The proposed waiver authority is also unlikely to uncover much fraud because corporate counsel is unlikely to have the evidence sought, particularly if the waiver power is granted by this Court. The retroactive waiver rule sought here will have no impact on corporate insiders' privilege as to their personal lawyers. The more pervasive impact would be to chill the willingness of corporate personnel to confide in corporate counsel, and to prevent and inhibit honest management from utilizing counsel for the purposes that the privilege seeks to promote—especially when insolvency looms.

The proposed waiver power would discriminate against insolvent debtors, and would create unjustified, irrational consequences of bankruptcy that would merely be compounded if the Court were somehow to arrive at a

selective adoption of the trustee waiver authority, either to corporations alone or to non-natural "persons".

Absent express congressional authority, the bankruptcy system should not be used to vitiate privilege.

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ARGUMENT

Introduction: The Nature of the Issue

The Government formulates the issue in this case solely in terms of bankruptcy trustees' waivers of corporate debtors' attorney-client privilege, although this issue necessarily implicates the same waiver power as to non-corporate debtors (*e.g.*, individuals, partnerships). Moreover, should the Court somehow find such waiver power implied in the Bankruptcy Code, this issue fairly includes the subordinate questions, both substantive and procedural, of how this extraordinary power may be exercised by trustees in light of their conflicting fiduciary obligations, the constraints imposed by the bankruptcy statutes, and the supervision of the bankruptcy court and the Attorney General to which they are subject.[6] (Rule 21.1(a)).

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[6] In eighteen judicial districts (including the Northern District of Illinois) United States Trustees exercise supervisory powers over private trustees such as Trustee Notz in this bankruptcy (28 U.S.C. 586(a) (1) and (3)) and also serve as bankruptcy trustee when no private trustee is available (11 U.S.C. 15701(b)). U.S. Trustees are appointed by and subject to removal by the Attorney General (28 U.S.C. 581(a), (c)), and are "under the general supervision of the Attorney General" (28 U.S.C. 586(c)). The bankruptcy trustees that the Government would allow to waive private debtors' attorney-client confidences are responsible to the nation's chief law enforcement officer—which explains their pattern of "voluntary cooperation" with government investigations of their debtors (Pet., 16).

The Government seeks to narrow the Court's focus and to avoid the troublesome consequences of the power it advocates. Similarly, the Government disregards significant aspects of privilege law and of the circumstances in which this case arises, and accordingly presents a distorted view of both the issue generally and the impact of the decision in this case.

The Government's proffered concerns are with insider misconduct, and concommittantly with preventing "prior management" from vetoing bankruptcy trustees' waivers of attorney-client privilege in order to "shield" insiders from disclosure of their fraud. The Government insists that access to attorney-client confidences (from the lawyer) is crucial to trustees' bankruptcy duties and to its own law enforcement functions. (See Point III, *post*, pp. 30-31). This hostility to privilege has nothing to do with the circumstance of bankruptcy (or to the corporate status of the debtor).

The Government would reverse the fundamental policy underlying the privilege: that the encouragement of fully informed legal advice before the fact, to promote compliance with the law, is more beneficial than disclosure of confidential communications after the fact to remedy or prosecute illegal conduct, as the Seventh Circuit observed below,[7] noting *Upjohn Co. v. United States,* 449 U.S. 383

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[7] "The assumption underlying the privilege is that 'the benefits derived from encouraging communications outweigh the costs of keeping information from other parties.' See Note, Attorney-Client Privilege for Corporate Clients: The Control Group Test, 84 Harv.L.Rev. 424, 425 (1970)." (722 F.2d at 340; Pet. App. 5a.)

(1981); *Trammel v. United States,* 445 U.S. 40 (1980); *Fisher v. United States,* 425 U.S. 391 (1976); *Hunt v. Blackburn,* 128 U.S. 464 (1888). This appeal is an attack on the attorney-client privilege.

The Government's characterization of this case also masks the fact that the objection to the trustee's "waiver" of the corporation's privilege here is not solely by "former management". Respondent Andrew McGhee is a substantial *shareholder* in the bankrupt corporation and represents the interests of the *owners* of the debtor corporation, none of whom have sided with the trustee. Despite its expressed concern with insider fraud, the Government's arguments ignore the rights of the corporation's *owners.*

The emphasis on corporate insiders "shielding" their fraud is a red herring, both in this case and generally. Here, the Respondents McGhee are already financially liable and one has already suffered criminal penalty.[8]

In the general case, the Government presumes insider fraud is a routine attribute of corporate insolvencies (but not apparently of all business bankruptcies). Yet even where inside fraud or other misconduct has occurred, it is simply not true that access to privileged discussions—from the debtor's *attorney*—is necessary to discover it.

---

[8] Frank McGhee plead guilty to violating the Commodity Exchange Act (7 U.S.C. § 13(a)) and is serving his sentence (Pet. Br., 6 n11). He has also entered into a settlement agreement providing for a voluntary judgment in an amount approximating the remaining 32% of CDCB customer claims not yet paid. (See, Trustee's Pet. Amicus Br., at 3 n1). A judgment has been entered against Andrew McGhee in the amount of $145,504.51 (U.S. Bankr. Ct., N.D. Ill., Case No. 80 B 14492; Adversary No. 80 A 2143).

Yet that is the sole justification advanced to support bankruptcy trustee waivers.

The Government's false pleas of necessity and the spectre of "shielding" are belied by the settled law of privilege itself. First, as the Government correctly notes, insiders are not individually protected by the corporation's privilege and may not assert it for their personal benefit (Pet. Br., 11). Similarly, corporate insiders cannot assert a corporate Fifth Amendment privilege, and the corporation itself cannot shield disclosure by invoking that personal privilege. *See, Bellis v. United States,* 417 U.S. 85, 87-91 (1974).

Second, all of the insiders (directors, officers, employees) are subject to interrogation as to the underlying factual information without any shielding effect by attorney-client privilege, whch does *not* bar disclosure of the relevant *information* simply because it has been disclosed to an attorney. Disclosure is thus available to the trustee, to the Government, and to creditors. The privilege insulates the confidential communications between attorney and client:

> The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney:
>
> > "[T]he protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney."

> > Philadelphia v Westinghouse Electric Corp., 205 F Supp 830, 831 (ED Pa 1692).
>
> See also Diversified Industries[, Inc. v Meredith], 572 F2d [596], at 611; State ex rel. Dudek v Circuit Court, 34 Wis 2d 559, 580, 150 NW2d 387, 399 (1967) ("the courts have noted that a party cannot conceal a fact merely by revealing it to his lawyer").
>
> *Upjohn, supra,* 449 U.S. at 395-396 (1981)

Third, documents and other "recorded information" of the bankrupt client, whether in the hands of the attorney or anyone else, are subject to disclosure and are not protected by the privilege unless they would be privileged in the hands of the client.[9] *Fisher v. United States,* 425 U.S. 391 (1976).

Finally, but most importantly, the attorney-client privilege does not shield disclosure of attorney-client conversations relating to the planning or commission of on-going fraud, crimes and ordinary torts. *Clark v. United States,* 289 U.S. 1, 15 (1933); *Fisher v. United States,* 425 U.S. 391, 403 (1976); *Garner v. Wolfinbarger,* 430 F.2d 1093 (5th Cir. 1970), *cert. denied,* 401 U.S. 974 (1971); McCormick, *Law of Evidence,* Ch. 10, § 99, 200-201 (2d Ed. 1972); Cleary & Graham, *Handbook of Illinois Evidence,* § 505.7(1) (4th Ed. 1984). Hence, no "waiver" or invasion of attorney-client privilege is needed to compel disclosure from attorneys of their prior or contemporaneous knowledge of on-going insider fraud.

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[9] In bankruptcy, of course, the trustee is immediately entitled to receive all relevant "recorded information" directly from the debtor (11 U.S.C. § 521(4)) and from the debtor's attorney and accountant (11 U.S.C. § 542(e)) unless privileged.

In this context, the issue in this case reduces to whether a bankruptcy trustee can force the disclosure of all confidential pre-bankruptcy *discussions* between attorneys and clients to others such as the Government and creditors. This issue is far more acute and considerably broader than the Government suggests, and has little if anything to do with the obtaining, by anyone, of information necessary for the administration of bankruptcy estates or even the discovery of fraud.

In this case, it should be noted that attorney Weintraub cooperated with the Government's investigation to the maximum extent allowed by his ethical obligations. He produced all documents requested by the CFTC. He answered over 800 questions under oath. The Government's entire claim that only he can now provide answers to the disputed 23 questions—which undisputedly require divulging of privileged communications—is thoroughly spurious. As Trustee Notz points out, Respondent Frank McGhee has himself committed to make full disclosure to the trustee (Trustee's Pet. Amicus Br., 3 n1).

I. The Bankruptcy Code and Congressional Intent

The powers of bankruptcy trustees, including any power to waive the debtor's attorney-client privilege, derive from federal bankruptcy law. As the Seventh Circuit concluded below:

> Although the [Bankruptcy Reform] Act [of 1978] confers broad powers on the trustee, ***nowhere*** is the trustee given specific authority either to assert or waive a corporate debtor's attorney-client privilege.
>
> 722 F.2d at 342 n8 (*see*, Pet. App. 9a n9) (emph. added)

Despite a comprehensive survey of trustee powers under the Bankruptcy Code (including the provisions of Subchapter IV of Chapter 7 which are specifically applicable to commodity brokers (Pet. Br., 19-21)), no trustee power to waive or control the bankrupt's privilege is to be found. There is none.

The Government asks this Court to engraft such a power onto the Code, notwithstanding the congressional omission. In light of the extensive statutory detail of specific powers granted to trustees by Congress, the claim that this additional but unstated power may be inferred is untenable. The contention that trustees' inability to waive debtors' privileges would be "inconsistent with the scheme established by Congress" (Pet. Br., 27) rings hollow: in almost 200 years of bankruptcy legislation,[10] Congress has not found it necessary to grant such a power. Like the former Acts, the 1978 recodification of the bankruptcy laws makes no mention of evidentiary privileges among the subjects over which trustees gain control. If Congress had ever intended such a dramatic consequence of insolvency, it could have and would have said so in plain language.

The congressional intent to preserve the attorney-client privilege in bankruptcy, and Congress's consistent understanding that debtors' privileges generally apply in bankruptcy, are to the contrary.

With respect to the attorney-client privilege specifically, Congress has *expressly prohibited* bankruptcy trustees from themselves obtaining privileged attorney-client confidences from the debtors' counsel:

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[10] *E.g.*, Act of April 4, 1800 (2 Stat.L. 19); Act of August 9, 1841 (5 Stat.L. 440); Act of March 2, 1867 (14 Stat.L. 517); Act of July 1, 1898 (30 Stat.L. 544); Bankruptcy Reform Act of 1978, P.L. 95-598.

> (e) *Subject to any applicable privilege,* after notice and a hearing, the court may order an attorney, accountant, or other person that holds recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs, to disclose such recorded information to the trustee.
>
> 11 U.S.C. § 542(e) (emph. added)

Three points must be emphasized about § 542(e). First, Congress reiterated the validity of the privilege as against the trustee, which is a step beyond the issue in this case (trustee "waivers" and disclosure of pre-bankruptcy confidences to others, such as creditors and the Government). Second, the statutory restriction would be meaningless (and utterly unnecessary) if the trustee already had the power to waive the very privilege to which § 542(e) makes him "subject". Congress's enactment of § 542(e) is inconsistent with the argument that a general waiver power may be read into the Code.

Third, this statutory restriction protecting the privilege from the trustee is especially significant in light of the purpose of § 542(e): to expand trustees' power to obtain "recorded information" from debtors' attorneys, by "depriving professionals of the leverage they had under State lien provisions" to withhold documents in their possession until they were paid.[11] (Comment, 11 U.S.C.S.

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[11] The Government says that Congress "left *the privilege issue*" to be decided by the courts," citing floor comments at the time of the final House amendments to the 1978 legislation (Pet. Br., 22 n39). What the statute left to the courts, appropriately, was the case by case determination of what is privileged, *i.e.*, when the privilege is applicable to specific documents. The cited comments, like the remainder of the legislative history, never mentioned or even alluded to trustee "waivers" of debtors' privileges or trustee disclosures of privileged matter to others.

(Continued on following page)

§ 542; *see also,* House Rept. No. 95-595, 95th Cong., 1st Sess., 396-370 (1977) ("House Report"); Sen. Rept. No. 95-989, 95th Cong., 2d Sess., 84 (1978) ("Senate Report"). The only function of the limitation is to prevent the added trustee power from reaching *privileged* documents.

Section 542(e) is consistent with Congress' historical understanding that common law privileges apply in bankruptcy even as against the trustee—absent statutory provision granting the trustee access to privileged information—which has long been the common view. (*See, e.g.,* 5 Remington, Treatise on the Bankruptcy Law, §2003, 82 (15th Ed. 1953).) In §21(a) of the Bankruptcy Act of 1898, which formerly governed the examination of the debtor and related parties, Congress eliminated the spousal privilege by express proviso. That provision would have been utterly unnecessary if the privilege were not applicable in the first instance, and would be nugatory as against the trustee if the trustee could simply circumvent the privilege by exercising a "waiver".[12]

(Continued from previous page)

To the extent that the cited remarks suggest that the validity of debtors' privileges against their trustees was then unclear, the speakers failed to indicate any basis for that conclusion, which is unsurprising since *no decision* has been found holding that trustees may invade debtors' privileges. The weight of authority is uniformly contrary: *In re O'Donohoe,* 18 Fed. Cas. 587 (Fed.Cas. No. 10,435) (D.Me. 1869); *In re Krueger,* 14 Fed.Cas. 870, (Fed.Cas. No. 7,942), 2 Lowell 182 (D.Mass. 1872); *In re Aspinwall,* 2 Fed.Cas. 64, (Fed.Cas. No. 591), 7 Ben. 433 (S.D.N.Y. 1874); *In re Teuthorn,* 5 Am.Bankr.R. 767 (D.Mass. 1901). Moreover, if the cited remarks were to be interpreted as the Government suggests, then they would be *contrary* to what the legislation itself provided—that attorneys are *not* required to turn over privileged documents.

[12] As the Seventh Circuit put it below: "Such a passage of the privilege could engender the absurd result of the trustee waiving the debtor's privilege as to information sought by the trustee." (722 F.2d at 342; Pet. App. 10a.)

Unlike its treatment of the spousal privilege, Congress has never provided for compulsory disclosure of attorney-client confidences in bankruptcy, to the trustee or anyone else. The laws governing bankruptcy examinations have not been materially changed since 1867, and have never permitted trustees to compel disclosure of information protected by their debtors' pre-petition attorney-client privilege. *In re O'Donohoe,* 18 Fed.Cas. 587 (Fed.Cas.No. 10,435) (D.Me. 1869); *In re Kreuger,* 14 Fed.Cas. 870 (Fed.Cas.No. 7,942), 2 Lowell 182 (D.Mass. 1872); *In re Aspinwall,* 2 Fed.Cas. 64 (Fed.Cas.No. 591), 7 Ben. 433 (S.D.N.Y. 1874); *In re Teuthorn,* 5 Am.Bankr.R. 767, 774-775 (D.Mass. 1901).

Under Section 343 of the Bankruptcy Code (11 U.S.C. §343), as well as under its predecessors (Section 21(a) of the Bankruptcy Act of 1898 and Section 26 of the Bankruptcy Act of 1867), a trustee *cannot* compel disclosure of information covered by the debtor's pre-petition attorney-client privilege, either (i) by examination of the debtor's attorney (*In re Aspinwall, supra*), or (ii) by examination of the debtor:

> Undoubtedly, a bankrupt is bound to disclose the whole truth concerning his property, dealings, &c., and to surrender all his books, contracts, &c., to his assignee; equally true is it that every witness, whether a party in interest or not, is bound to disclose the whole truth concerning the matter under inquiry: but the whole truth does not include confidential communications between client and solicitor, or client and counsel, which are admissions made under the seal of authorized secrecy.
>
> *In re Krueger, supra,* 14 Fed.Cas. at 871

or (iii) by employment of the debtor's counsel or former counsel:

> . . . but it seems to me that the time to determine the question as to the right of the bankrupt's former attorney to conduct the examination in behalf of the trustee is at the beginning . . .; that it should be said at the outset, that to admit him to appear at all in the matter is in effect to remove the protection with which the law surrounds the bankrupt, and to subject the privilege which has been given to the communications which he has made to his counsel to the danger of indirect and insidious assault . . .
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> *In re Teuthorn,* 5 Am.Bankr.R. 767, 774-775 (D. Mass. 1901)

Congress' consistent failure to overrule these decisions in all of the succeeding years of bankruptcy legislation is significant. The recently-contrived trustee waiver theory flies in the face of this long-settled, congressionally-accepted principle. Moreover, none of the recent decisions which have allowed trustee waivers of debtors' attorney-client privilege have even considered this body of law.[13]

Trustee waiver power cannot be judicially inferred on the basis of legislative intent or history, which are contrary, rather than supportive or even silent. The Government and the trustee are each barred by settled law from piercing the confidentiality of attorney-client communications; what they seek here is judicial approval to invade the privilege collectively when neither can lawfully do so alone. The result, of course, would be to undermine the privilege and to create a consequence of bankruptcy (voluntary or involuntary) which Congress never contemplated and cannot be held to have permitted by inference.

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[13] See cases cited by the Government (Pet. Br., 24 n41).

II. The "Management" Theory of Trustee Waivers

In the absence of express statutory authority for trustees' control of their debtors' privileges, the Government resorts to the theory that the missing power may be inferred into the aggregation of delegated powers. The Government reasons that if bankruptcy trustees have been given certain of the powers which corporations' elected boards of directors hold, then trustees should have all such powers.

A. The Government's Theory Lacks Support

The Government's "management" theory has been adopted by a single district court in an unpublished opinion. *In re Continental Mortgage Investors,* No. 76-593-S (D.Mass. July 31, 1979) (Chapter X reorganization). That decision has not been followed in the intervening years, even by those courts which have arrived at the same result of permitting trustee waivers.[14]

The Seventh Circuit below rejected the management theory (722 F.2d at 342; Pet. App., 8a, 16a), along with

[14] The three Circuits which have approved trustee waivers of their debtors' attorney-client privileges have each based their decisions on other theories: *Citibank, N.A. v. Andros,* 666 F.2d 1192, 1195 (8th Cir. 1981) (the privilege "passes with the property" of the debtor to the trustee); *In re O.P.M. Leasing Services, Inc.,* 670 F.2d 383, 387 (2d Cir. 1982) ("the . . . privilege adheres to the trustee by virtue of the nonexistence of any other entity authorized to so act" under the particular circumstances); *In re Boileau,* 736 F.2d 503, 506 (9th Cir. 1984) (examiner gained "expanded powers" including control of the debtor's privilege under the "distinctive" facts, by virtue of his appointment "by stipulation"). Except for the *Continental Mortgage* opinion, the district court and bankruptcy court decisions which have allowed trustee waivers have either adhered to one or more of these theories or have simply followed the *Citibank* or *O.P.M.* "rule" allowing trustees to waive their debtors' privilege. That is the nature of the "weight of authority" (Pet. Br., 24) favoring trustee waivers; *see* cases cited at *id.,* 24 n41.)

Continental Mortage, as well as *Citibank, N.A. v. Andros,* 666 F.2d 1192 (8th Cir. 1982) which relied on *Continental Mortgage* but adopted a *different* theory of trustee waiver power (the "property" theory: that the privilege passes with the debtor's property). The Government's theory does not have significant judicial support.

The "management" theory of inferential powers is also unsupported by the Bankruptcy Code. The Code does not grant a general "management" power to trustees over the affairs and rights of debtors (even in Chapter 7).

What Congress has done in creating bankruptcy trusteeships and in prescribing their relationships and powers bears review. The Code makes the trustee "the *representative* of the *estate*" of the debtor (11 U.S.C. §323(a)). (It does not make the trustee the representative of the debtor itself, nor has Congress merged debtors—even corporate debtors—into their bankruptcy trusteeships.[15]) The Code, in turn, defines the estate to be "comprised of all the following property . . ." (11 U.S.C. §541). The extensive enumeration of specific powers that the Code then grants to trustees all pertain to the "estate" and thus the

[15] As the Seventh Circuit observed (722 F.2d at 342; Pet. App. 9a):

> . . . the trustee . . . does not replace the corporation as an entity. *** Nor does the trustee succeed to the positions of the officers and directors of the corporation. [15 A.W. Fletcher, *Private Corporations* § 7657 (Rev.Ed.1981)] In brief, the corporation will continue to exist, until formally dissolved by action of its shareholders or by the state [of incorporation].

Despite its attack on the Seventh Circuit's corporate law conclusions, and its claim that the court ignored Bankruptcy Code provisions that "completely divest former management of any control over the firm's *operations*" (Pet. Br., 18 n28) (emph. added), the Government fails to find any authority for the proposition that elected corporate officers cannot continue to represent ownership during bankruptcy.

property of the bankrupt. The statutory nature of trustees is thus quite different than the universal management role (or alter ego) in which the Government would cast them.

Unless the Court were to hold that evidentiary privileges are "property" of debtors, and thus part of the estate, it is difficult to see how bankruptcy trustees can come to control such rights. The Government understandably relegates the "property" theory of trustee waiver power to an alternative position, gently suggesting in one footnote that the privilege might be viewed as an "intangible asset that passes to the trustee" (Pet. Br., 22 n38). It cannot. Like civil and constitutional rights, evidentiary privileges are simply not property rights.[16]

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[16] Evidentiary privileges, unlike property, are procedural rights which arise purely as matters of law, and are not assignable, devisable or inheritable, nor subject to creditors' levy (nor currently taxable).

In Illinois, the attorney-client relationship, of which the privilege is an attribute, is unassignable. *Clement v. Prestwich,* 14 Ill.App.3d 479, 448 N.E.2d 1039 (2d Dist. 1983). It does not pass to a trustee in bankruptcy, who may not assert his debtor's interests as a client against his former attorney. *Christison v. Jones,* 83 Ill.App. 3d 334, 405 N.E.2d 8, 11-12 (3d Dist. 1980):

> . . . the personal nature of the [attorney-client] relationship and the duty imposed on the attorney, coupled with the public policy considerations surrounding that relationship and any breaches thereof . . . lead us to conclude that the legal malpractice claim is not subject to assignment.
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> * * *
>
> . . . the decision as to whether a malpractice action should be instituted should be a decision peculiarly for the client to make. To allow that decision to be made by an assignee or by a trustee in bankruptcy, without any regard to the client's wishes or intentions (or completely contrary to the client's wishes) would be to encourage the untoward consequences set forth in *[Goodley v. Wank & Wank, Inc.,* 62 Cal.App. 3d 392, 133 Cal. 83 (1976)] . . . . We conclude that a cause of action for legal malpractice . . . is not part of the estate of the bankrupt . . . .

It should be noted that *if* privileges were treated as "property", bankruptcy trustees would require court approval to dispose of them (*e.g.,* by waiver), under 11 U.S.C. § 363(b).

Even if the various Code trustee powers may be generically characterized as management-type powers, the only "management" which the trustee is authorized to exercise is over the *estate* (which is property) and *not* over the debtor itself or the debtor's non-property rights. The Bankruptcy Code simply provides no basis for expanding the powers which have been granted to trustees with respect to their debtors' estates to reach a power which has not been granted over rights which are not part of the estate.[17]

B. Bankruptcy Trustees are Different Than Corporate Management Outside of Bankruptcy

Despite the fact that bankruptcy law does not make bankruptcy trustees the alter ego of their debtors, nor designate them as successors of corporate directors, nor vest in them any blanket power to exercise *all* of the authority vested in those positions, the Government argues that this Court should reach these results by analogy and disregard the basic differences in the roles of owner-elected corporate management and creditor-elected bankruptcy trustees.[18]

The most glaring differences between bankruptcy trustees and non-bankruptcy management (of corporations, of partnerships and of individuals) are *whom* they repre-

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[17] The Seventh Circuit correctly recognized that the "management" analysis, despite its functional trappings, essentially collapses back into the "property" view of the *Citibank* decision. (722 F.2d at 342; Pet. App. 9a.)

[18] The Government seemingly recognizes that its reasoning is less than perfect. It is constrained to argue that the trustee's fiduciary duties "parallel" (Pet. Br., 16) and "are analogous to" (*id.,* 17) those of pre-bankruptcy management. The Government's view is made clear in its formulation of the issue as "who constitutes *the 'management'* . . . in bankruptcy" (Pet. Br., 22), which simply assumes the issue in this case.

sent, from *whence* they come, and *to whom* they are answerable.

Liquidation trustees come from the creditors, who elect them[19] (11 U.S.C. §702), and whom they represent as a practical matter. Non-bankruptcy management, on the other hand, is chosen by the *owners*. Although the Government argues that the owners (shareholders, in the case of a corporation) are *among* the class of creditors to whom trustees owe a duty (Pet. Br., 17), the owners are (i) at the very bottom of the class (11 U.S.C. §726) and (ii) generally disqualified from voting in the trustee's election (11 U.S.C. §§702, 726(a)(6)).

In any event, corporate "management" owes its sole fiduciary duty to ownership—bankruptcy trustees at best owe a residual portion of their collective duty to owners. This distinction cannot be papered over by legal rhetoric: the trustee will often act and decide matters differently than management because he is guided by different goals, loyalties, and responsibilities. Corporate management does not, like the trustee, have fiduciary obligations to general creditors.[20]

As courts have observed, it is not at all uncommon for the trustee's duties and collective responsibilities—not to

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[19] Except when they come from the Government, *e.g.*, through the United States Trustee's office. (11 U.S.C. 15701.) (*See ante*, p. 7 n6.) In the 18 districts having U.S. Trustees, that federal officer selects *interim* trustees "promptly after the order for relief" in Chapter 7 cases. (*Ibid.*)

[20] Corporate officers and management generally do not have fiduciary duties to their company's creditors, although the *corporation* certainly has *legal* duties to its creditors. The corporation may even have fiduciary obligations to certain of its creditors (*e.g.*, financial customers), but the existence of a fiduciary duty depends upon the legal relationship. The general debtor-creditor relationship is not yet amongst those giving rise to "fiduciary" duties.

mention his loyalty to those who have elected him—to place him in *conflict* with the interests of ownership. Outside of bankruptcy, management never is in conflict with the interests of ownership (or it rapidly ceases to be management).

In *In re O.P.M. Leasing Services*, 670 F.2d 383, 386 n2 (2d Cir. 1982), the court noted the observation in *Ross v. Popper*, 9 B.R. 485, 487 (Magistr. S.D.N.Y. 1980) (aff'd by the district court without separate opinion) that bankruptcy trustees "frequently" side with creditors even when contrary to the bankrupt's interests; and the *O.P.M.* court acknowledged that a trustee's duties can "place him in conflict with the interests of the debtor." The observation in *Popper* was:

> In that context [pre-bankruptcy attorney-client communications], it seems to me almost axiomatic that the beneficiary of such communications is the bankrupt corporation itself, whose interests are quite obviously adverse to the interests of the trustee in bankruptcy, representing the general creditors. It therefore seems . . . that the only proper person to decide whether there should be a waiver of attorney-client privilege respecting transactions that took place prior to bankruptcy is the bankrupt corporation itself, by its authorized officer or officers.

Quite recently, in *In re Vantage Petroleum Corp.*, 40 B.R. 34, 40 (Bankr. E.D.N.Y. 1984), a bankruptcy judge concluded:

> The bankruptcy cases involved herein clearly demonstrate that the Trustee's relationship to the debtor corporation may be as adversarial as the relationship between the prosecutor and the subject of a criminal investigation. It would be as anomalous to allow the prosecutor to waive the subject's privilege, as it would be to allow the trustee to waive the debtor corporation's privilege.

Vantage Petroleum is especially poignant because it arose in the Second Circuit after *In re O.P.M. Leasing Services, Inc., supra,* which the bankruptcy court reassessed in light of the Seventh Circuit's opinion in this case. *O.P.M.* had relied on the *absence* of any corporate officials in allowing a bankruptcy trustee to waive the corporation's attorney-client privilege; the *Vantage Petroleum* court refused to countenance a waiver by the trustee(s) there, if officers of the corporate debtors were shown to be available to control their corporations' privileges, commenting:

> The duties of a trustee in a chapter 11 case are enumerated in 11 U.S.C. §1106. This enumeration can not be construed, through the express language or by implication, to strip the debtor and its directors and officers of all legal rights and responsibilities. The power to waive or assert the attorney-client privilege is not expressly dealt with.
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> The right to assert an attorney-client privilege as to pre-petition matters should be, perhaps, one legal right of the debtor to remain unscathed after a trustee has been appointed.
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> • • •
>
> . . . the policy concerns behind the existence of the attorney-client privilege are as applicable to an entity before it files for bankruptcy as to any other entity. Absent express language in the Bankruptcy Code, the privilege should not be abrogated in the situation where its protections may be needed most.

Another distinction between the roles of non-bankruptcy "management" and bankruptcy trustees is that trustees are officers of the court (*Freeman Coal Mining Corp. v. Burton,* 388 Ill. 604, 58 N.E.2d 589, 593 (1944), *cert. denied,* 325 U.S. 859 (1945)), answerable to the bankruptcy court (see, *Imperial Assurance Co. v. Livingston,* 49 F.2d 745, 748 (8th Cir. 1931)). Moreover, many of the trustee's powers (which the Government here terms "management"

powers) are not actually delegated to the trustee, but are exercisable only with bankruptcy court approval (*e.g.,* 11 U.S.C. §§ 363(b), 364(b), 364(c), 364(d), 365, 721). Non-bankruptcy management is answerable to ownership only, and not to courts for its routine "management" decisions, absent extreme circumstances.

Aside from the differences in accountability and loyalty, non-bankruptcy management and bankruptcy trustees have different goals and objectives. This is especially so in Chapter 7 liquidations, such as is involved here.

The liquidation trustee has a single overriding goal: maximizing the net value of the estate at one point in time and as soon as practicable. House Report, 379 (1977); Senate Report, 93 (1978). Non-bankruptcy management, on the other hand, runs a going business with a long-term view—to income production, preservation and upgrading of capital assets (and their financing), personnel, changing technology and the myriad of related concerns which determine the bottom lines (ongoing income *and* present ownership value). The trustee has other concerns; his goals are inherently short-term, and normally (absent court approval under 11 U.S.C. § 721) liquidating trustees do not operate their debtors' businesses except to wind up its affairs.[21] And of course, the trustee's perspective towards

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[21] The Government's statement that "in a commodity broker liquidation, the trustee always . . . manage[s] the firm's business" (Pet. Br., 25 n42) is misleading: the trustee does so, but only as necessary to close out open trades, wind up the firm's affairs, and liquidate the assets. In fact, the provisions of the special commodity broker subchapter (IV of Chapter 7) of the 1978 Code were added to facilitate "orderly liquidation"; they reduced the trustee's discretionary powers over the debtor's outstanding contracts and substituted four specific powers aimed at directing commodity broker trustees how to close out open trading positions. (House Report, 272.) That legislation has nothing whatever to do with attorney-client privilege or insider fraud.

creditors is precisely the reverse of non-bankruptcy management's.

The trustee-ownership conflict is often reflected in a basic bankruptcy dispute: whether a Chapter 7 proceeding should be continued or dismissed. (Dismissal is available to corporate debtors and commodity brokers. 11 U.S.C. § 707.) Trustees often oppose debtors on such motions, demonstrating both the adversity of ownership and trustees and the need for (and judicial recognition of) distinct ownership representation in bankruptcy.[22] The argument that corporate management has no power and cannot continue to represent the corporate ownership would preclude a corporation from even requesting a dismissal, even if it had settled with its creditors.

The fundamental differences in underlying motivation predictably lead to different decisions by trustees in "managing" their debtor's estates than the debtor would make outside of bankruptcy—whether or not the business is in fact solvent or insolvent. This applies with equal force to decisions respecting "waiver" or disclosure of prior attorney-client confidences. The trustee is simply not the same as, or in the same position as, non-bankruptcy management.

C. The "Management" Theory is Not Uniquely Applicable to Corporations, but Would Sanction Trustee Waivers of All Debtors' Privilege(s), Including Individuals'

The Government's reliance on the "management" approach to support a trustee waiver power appears intended

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[22] See, e.g., *Re Hall*, 15 B.R. 913, 8 BCD 556, 5 C.B.C.2d 1028 (BAP 9th Cir. 1981); *Re Ross*, 21 B.R. 5 (Bankr. E.D.N.Y. 1982); *Re Pagnotta*, 22 B.R. 521, 9 BCD 600 (Bankr. Md. 1982); *Re Bryant*, 28 B.R. 362 (Bankr. N.D. Ind. 1983); *Re Jackson*, CCH Bankr. Rptr. ¶ 67765 (Bankr. E.D. Tenn. 1980).

to contrive a legal theory susceptible of selective application to corporate debtors—seemingly to avoid the unpalatable result of bankruptcy trustees waiving the privileges of *individuals*. The management theory does not accomplish this goal, just as the Eighth Circuit's "property" approach in *Citibank*, supra, has not avoided this result.[23]

Nor does the Government contend that its theory preserves individual privilege in bankruptcy: it hedges its position on waiver and disclosure of individuals' attorney-client confidences (Pet. Br., 23 n39)[24] on a trustee's "whim" (722 F.2d at 343; Pet. App. 10a) or "judgment as to the best interests of the *estate*" (Pet. Br., 32 n51) (emph. added). Claiming incorrectly that individual debtors' privileges are not implicated here, the Government reserves its position to pursue individual privilege in other litigation, even while citing decisions that have permitted trustee waivers of individual and partnership privilege as authority for permitting such waivers of corporate privilege.[25]

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[23] *Citibank, N.A. v. Andros*, 666 F.2d 1192 (8th Cir. 1981), has been applied by lower courts to permit bankruptcy trustees to waive the attorney-client privilege of *individual* debtors, e.g., *In re Smith*, 24 B.R. 3 (Bankr. S.D.Fla. 1982); *In re Grand Jury Proceedings, Grand Jury No. 84-21* (S.D.Cal. June 21, 1984) (unpublished).

[24] The Government says that "different considerations arguably may apply" to the question of who may waive an individual's privilege in bankruptcy (Pet. Br., 23 n39), but refuses to take a position on the result, while avoiding identification of such considerations. No analysis is suggested as to how such "considerations" might differ from those advanced against corporations here—or how such considerations might relate to (i) the "management" theory, or (ii) the trustee's statutory powers (on which that theory is based), or (iii) the "property" analysis (with which the management view is inextricably tied).

[25] *In re Smith*, 24 B.R. 3 (Bankr. S.D.Fla. 1982) (individual debtor's privilege); *In re Boileau*, 736 F.2d 503 (9th Cir. 1984) (partnership debtor's privilege).

(Continued on next page)

Under the Bankruptcy Code, there is no way to distinguish between individual and corporate debtors with respect to the disputed power of trustees to waive their debtors' privilege. This is so whether the analysis looks to the powers of trustees, or to the succession of "management," or to the "property" involved. The Code does not differentiate in any of these regards (or in any significant regard whatever) between individual and corporate debtors, nor for that matter does the Code differentiate partnership debtors (as to which the Government is silent).

Individuals, corporations and partnerships are all "persons" under the Code (11 U.S.C. § 101(33)) and are equally eligible to avail themselves (or to be involuntarily availed) of bankruptcy; *see,* 11 U.S.C. §§ 109, 301, 303. Relief under Chapter 7 is equally available to individuals, corporations and partnerships. Thus, liquidation or "straight bankruptcy" is not at all unique to corporations[26] (11 U.S.C. § 109). There is no overall distinction in bankruptcy between individual and corporate bankrupts.

Nor is there any distinction between the powers of individual and corporate debtors' trustees in bankruptcy.

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It must be noted that both the Government and Respondents have misread *Boileau, supra:* the debtor was "Paul J. Boileau . . . doing business as Boileau & Johnson" (736 F.2d at 504), a partnership (*id.,* at 506). The *Boileau* court allowed an examiner (based on a stipulation) to waive the partnership's attorney-client privilege, but not an individual's privilege (as Respondents stated in error, Res. Br. Opp. Cert., 11), nor a corporation's privilege (as the Government erroneously contends, Pet. Br., 22 n39).

[26] Contrary to the impression cast by the Government, Chapter 13 wage-earner plans are not the sole form of bankruptcy for individual people and sole proprietorships (see, Pet. Br., 13 n18).

Trustees have the same powers with respect to the debtor's estate (which is the debtor's "property" for every type of debtor), and have no power over the debtor. None of the "management" powers on which the Government's theory relies apply selectively to corporations or are selectively inapplicable to individuals.[27] The "management" powers analysis gives the same powers to trustees to "manage" debtors' estates, whatever those powers may entail, without regard for the status of the debtor.

Moreover, the bankruptcy examination powers, which allow for investigation and discovery of the debtor's affairs by trustees as well as creditors, are noteworthy for their uniformity: they apply across the board to all debtors. (11 U.S.C. § 343; Fed.Bankr.Rule 2004.) Direct testimony by the debtor and any other person having knowledge of the debtor's business or finances is required. Either privilege applies in such examinations or it does not: there is no basis for two separate rules or results.

As the Seventh Circuit found below (722 F.2d at 342):

> The debtor has a clear right to assert privileges during this examination. *See In re Blier Cedar Co.,* 10 B.R. 993 (Bkrtcy.D.Me. 1981). *See also* 2 Collier on Bankruptcy, ¶ 343.12 (5th ed. 1982).

The Government has cited no authority for disputing that conclusion or for imposing a distinction between individual and corporate debtors unfounded in the statute and rule, both of which have been approved by Congress, which plainly did not contemplate or countenance the selective

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[27] This is also true of the trustee's powers in the special provisions of Subchapters III and IV of Chapter 7, which apply only to stock and commodity brokers (Pet. Br., 19-21). Brokers, moreover, can be individuals.

expansion of this examination power into privileged matters or the same result through the circuitous device of trustee "waivers".

When the analysis shifts in emphasis from the specific Code powers to the general panoply of trustees' "management" authority, there is again no distinction to be found between the trustee's power (or need) to "manage" the estate (property) of corporations and individuals. Whatever the business, finances and property of the *debtor* may involve, the trustee is in the identical "management" posture irrespective of the form of organization of his bankrupt.

The Government's final effort to carve a distinction between individauls and corporations, relying on the necessity for corporations to act through human agents, is a *non sequitor*. (Pet. Br., 31.) Any principal, corporate or individual or otherwise, can act through agents, and can act through more than one agent. The fact that corporations always do so is no basis for distinguishing individuals who optionally do so. And bankruptcy trustees are not agents of their bankrupts in any event (11 U.S.C. § 323(a)).

III. The Government's Sole Justification

The Government advances one justification for reading a waiver-of-privilege power into bankruptcy trustees' authority over their debtor's estates: insider fraud and misconduct. The proposed waiver power is said to be "a necessary adjunct" (Pet. Br., 15) of trustee "*duties*" under the Code (*ibid.*; *id.*, at 27) which are "impossible" to fulfill "without access to pre-petition communications with

counsel" (*ibid.*).[28] On this reasoning, the Government would permit waivers in favor of itself and creditors, as well as would allow trustees themselves to invade privileged pre-petition communications.

There are three aspects of the insider fraud spectre in the Government's argument: (i) the trustee's discovery of fraud and recovery from insiders (*e.g.*, Pet. Br. 14, 15, 27, 28, 29, 30, 32); (ii) the Government's prosecution of fraud (*id.*, 32-33); and (iii) the "shielding" by insiders of their fraud (*id.*, 27, 28, 36) by "vetoing" a waiver by a "cooperating" trustee (*id.*, 29, 32-33). The "shield" would presumably apply, like the privilege itself, against the entire world (*e.g.*, the Government, creditors, would-be creditors, and the trustee).

Analysis dispels the "need to get at insider fraud" justification, particularly the need to do so by obtaining privileged confidences from debtors' *attorneys*.

Initially, it is observed that the fraud discovery argument, even if accepted as a matter of policy, does not itself justify "waivers" to others. If this justification has any vitality, it extends no further than to the trustee's own obtaining of privileged communications for the benefit of the debtor's estate.

But if bankruptcy trustees' "need" to obtain privileged confidences were as acute and pervasive as is now

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[28] This approach presents the anomoly of inferring unstated *powers* from *duties* rather than from delegated authority. Such reasoning would go far to justify the expansion of governmental authority over private rights. Respondents submit that the more appropriate view, where established rights are involved, is to adhere to those rights unless they are expressly abrogated, explicitly subordinated to governmental authority, or simply eliminated in the first instance.

urged on this Court, then it is difficult to understand how such necessity arose only in recent years. Prior to *In re Amjoe, Inc.*, 11 Collier Bank. Cas. 2d (MB) 45 (M.D.Fla. 1976), no judicial decisions have been found permitting trustees to gain access to privileged matters by any device (*see e.g.*, cases cited at Pet. Br., 24 n41).

The absence of litigation and scholarly debate on the trustee access and "waiver" issues for so many years (since the 1869-1901 decisions which bar trustee invasion of privilege; *see,* pp. 16-17, *ante*) is virtually inexplicable—unless trustees were able to perform their duties *without* access to their debtor's privileges and unless the accepted legal view was that they had no such access or "waiver" powers. Otherwise someone would surely have litigated the question in that time.

The claim of "impossibility" for trustees' performance of their duties without access to pre-bankruptcy privileged communications is patently spurious. The 1984 rhetoric of "necessity" for abrogating privilege, like the device of bankruptcy trustee "waivers," is of recent manufacture. This newly-perceived "need" is little more than *desire* for an extraordinary power which Congress has not even recognized, much less supplied, although insider fraud is hardly a recent phenomenon.[29]

Just as the Government's plea of necessity does not hold up historically, so it fails to survive scrutiny on its merits. Debtors' attorneys, as repositories of pre-bank-

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[29] The "need" to remedy or punish financial fraud by invading attorney-client confidences has not been granted by Congress even when providing enforcement powers to agencies such as the CFTC and the Securities and Exchange Commission. *See,* 7 U.S.C. §§ 1, et seq.; 15 U.S.C. §§ 78a, et seq.

ruptcy confidences with their clients, are not the sole or even likely source of the information which the trustee needs. This is as true in the garden-variety corporate bankruptcy as in the particular circumstances of commodity and stock brokers, and whether or not insider fraud has occurred.

The most critical information is unprivileged and readily available. As reviewed *ante* (Introduction, pp. 10-11), recorded information and financial records of the debtor are available to the trustee, irrespective of who has possession. As in this case, the *debtor's* documents are unlikely to be privileged, particularly financial records, and for corporate debtors no Fifth Amendment rghts are involved.

The attorney is also an available source of *un*privileged information given to him by his client, including not only documents, but information not part of confidential or advisory discussions. In most cases, however, counsel is unlikely to have significant personal knowledge of the day-to-day transactions sought by trustees.

On the other hand, all of the debtor's employees (and officers and directors) are available to provide such information, and they are not protected against disclosure of the factual information required. And third-parties are reachable for both documents and testimony relating to the debtor's affairs (Fed.Bankr.Rule 2004).

As against all of these sources of information, the additional information available from the *attorney's* recollection and notes of prior confidential discussions with his client and its personnel (*Upjohn v. United States, supra*) is hardly critical to discovery of insider fraud.

Most significantly, the type of attorney-client disclosures which is the heart of what the Government seeks to obtain from attorneys is not protected by the attorney-client privilege in the first place: conversations concerning ongoing fraud, crime and tort. There is accordingly no need to invade or "waive" privilege to get at this unprivileged information. (*See* authorities cited *ante,* p. 11.)

For this reason, it is unlikely that malfeasing corporate insiders would consult counsel at all: few, if any, forms of insider fraud are unintentional or innocent (*e.g.,* diversion and hiding of assets, insider trading, looting schemes). Thus trustees are unlikely to find the smoking gun through the attorney, and if some rare instances prove the exception, there is no need to invade (or "waive") the attorney-client privilege.[30]

As to corporate counsel, it is more likely that any information he has concerning insider fraud stems from discussions with well-intentioned corporate personnel who are "whistle-blowing" or seeking the attorney's aid to discover, cure, or prevent legal problems, including insider malfeasance. These types of confidential attorney-client discussions are the very types of communications which

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30 Predictably, if the Court were to uphold bankruptcy trustee waiver power, corporate insiders with illicit plans would shun corporate counsel even more than under current law, particularly during times when insolvency seems possible. Moreover, to the extent that *privileged* knowledge of insider fraud is disclosed after the fact, it is likely to be personal defense counsel, not corporate counsel, who receive such confidences—and such disclosures would be unaffected by the decision of this case as to the *corporation's* privilege. Thus in all but rare instances, a waiver of the corporate privilege is an unpromising means to the ends sought by the Government.

the privilege is designed to promote. (*Upjohn Co. v. United States, supra.*) Occasional admissions of illegal conduct by the perpetrators of corporate misconduct are most likely to occur as the *result* of an internal investigation (as in *Upjohn*) or in preparation of a defense against charges already made. These circumstances, too, require the privilege to be protected.

As this case itself points out, the availability to the trustee of pre-bankruptcy attorney-client confidences is not a matter of necessity at all: it is a matter of *convenience,* time-saving and cost-avoidance. This is conceded by none other than the trustee himself. (Trustee's Pet. Amicus Br., 3.) Thus does the Government's claim of "necessity" collapse. Permitting trustees to invade and waive privilege would sacrifice the confidentiality of attorney-client communications on the altar of efficiency, not need. That argument is surely foreclosed by the policies which have given rise to the privilege in the first instance.

Two final points should be recognized in connection with the Government's effort to justify disclosure of privileged confidences in order to uncover insider fraud:

(1) if such justification is at all persuasive, that reason applies equally to *individual* debtors as it does to corporations (insider fraud is not unique to corporations); and

(2) the disclosure sought here by the Government (both to the trustee and to itself) is much *broader* and mischievous than the anti-fraud justification.

Just as insiders (officers, directors, and key management of technical employees) can defraud their corpora-

tion, so can the owners, employees and other "insiders"[31] of unincorporated enterprises do the same to their businesses (excepting insider trading of stock and possibly a few other devices). Fraud is not precluded by the form of business organization. Sole proprieterships (including individual investors), trusts and partnerships, engage in a wide variety of enterprises and frequently operate substantial, complex businesses. Like corporations, they regularly employ people to operate the business or to manage their affairs. They may even engage in businesses which impose fiduciary obligations to their customers (*e.g.*, brokerages, insurance agencies, real estate firms).

In any of these non-corporate forms, one can have insider fraud, particularly when bankruptcy looms: diversion of assets, prefential dealings, hiding of assets or secreting of funds out of the country or into the hands of friends or relatives. (*See, e.g., Goldstein v. United States*, 11 F.2d 593 (5th Cir. 1926), for one classic example.) The individual who anticipates bankruptcy because of unexpected investment or business reversals, or an act of God (or negligence) which generates uninsured losses or liabilities, can defraud his bankruptcy estate (creditors) just as a corporate insider can defraud the corporate estate. Such people have at least as great an incentive to do so as corporate insiders.

If anti-fraud considerations justify "passing" the attorney-client privilege to a corporation's trustee, then the same result is similarly justified for non-corporate debt-

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31 The Bankruptcy Code defines "insider" with respect to individuals and partnerships, as well as for corporations, for purposes of certain disqualifications (11 U.S.C. §101(25)).

ors. Like the Government's proffered legal theory, its policy justification for granting bankruptcy trustees control of their debtors' privilege applies across the board and would require the same disposition of individual's privilege(s).

Moreover, the rule advocated by the Government would yield an overly-broad and unwarranted disclosure of attorney-client confidences in two regards: (i) by opening the door to unlimited invasions of the privilege,[32] and (ii) by permitting (and arguable requiring) disclosures to others, such as creditors and those would-be creditors who desire to discover or press a claim by means of disclosure of attorney-client confidences, as well as to governmental authorities.

IV. Bankruptcy Trustee Waivers of Debtors' Attorney-Client Privileges Would Be Against Sound Policy

A. The Chilling Effect on Attorney-Client Communications

The prospect of counsel becoming a witness, and disclosing details of confidental discussions to government authorities and creditors, will predictably inhibit clients (and their agents) from freely confiding in counsel. The Government seeks judicial approval for bankruptcy trustees to compel their debtors' former attorneys to make such disclosures by the "waiver" device. The Seventh Circuit took the position:

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32 The "waiver" given in this case, if effective, would apply to "any communication or information occurring or arising on or before October 27, 1980" (J.A. 49), which encompasses the entire pre-bankruptcy life of the debtor.

. . . we reject the [waiver] argument because of its potential chilling effect on attorney-client communications. If the trustee in bankruptcy is permitted to waive the corporate debtor's privilege, the trust inherent in the attorney-client relationship will be jeopardized. Corporate clients will be wary of communicating fully with their attorneys for fear that sensitive information could subsequently be disclosed due to bankruptcy. Free interchange between attorney and client is the cornerstone of effective legal representation.

722 F.2d at 343; *see* Pet. App. 10a-11a

Such "free interchange" cannot exist in the absence of certainty of confidentiality:

> But if the purpose of the privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege . . . is little better than no privilege at all.
>
> *Upjohn Co. v. United States,* 449 U.S. 383, at 393 (1981);

see also, 449 U.S. at 402 (Burger, J., concurring).

The kind of retroactive imparirment of privilege advocated here, at the discretion of a bankruptcy trustee, would impart just such uncertainty. And its effect would be most felt when insolvency looms.[33] Withholding of in-

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[33] *See,* Note, *Bankruptcy/Waiver of Attorney-Client Privilege,* 73 Ill.B.J. 116 (No. 2, Oct. 1984):

> On a policy basis, the . . . waiver right does not pass to the bankruptcy trustee. During the period immediately preceding the filing of a bankruptcy petition, a debtor needs to be able to discuss freely and fully its situation with an attorney. Only then will the attorney be able to

(Continued on following page)

formation by clients has the effect of preventing the lawyer from rendering sound advice:

> [The privilege's] purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice . . . serves public ends and that such advice . . . depends upon the lawyer being fully informed by the client. As we stated . . . in Trammel v United States, 455 US 40, 51, 63 L Ed 2d 186, 100 S Ct 906 (1980): "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." And in Fisher v United States, 425 US 391, 403, 48 L Ed 2d 39, 96 S Ct 1569 (1976), we recognized the purpose of the privilege to be "to encourage clients to make full disclosure to their attorneys."
>
> *Upjohn Co. v. United States,* 449 U.S. 383, 389

There is no basis for the Government's prediction that *honest* clients and corporate personnel will speak just as freely to corporate counsel if they know that a bankruptcy

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(Continued from previous page)

> assess adequately the debtor's options and give the best advice. These considerations are precisely why the privilege exists. Any breach of the confidentiality afforded by the privilege would chill the willingness of a client to discuss fully and frankly the client's situation, leading to potentially erroneous or incomplete legal advice. Such a breach would occur if the bankruptcy trustee were given the power to waive the privilege. The result would be that, for financially insecure corporations, the possibility of a bankruptcy would raise fears of disclosure and would limit the willingness of clients to discuss their legal affairs. When the greatest need for consultation arose within the bankruptcy context, upon the eve of bankruptcy, a client would be in greatest need of legal advice but in greatest fear of what the attorney may later disclose.

trustee may someday compel the lawyer to disclose pre-bankruptcy confidences. Trustee "waivers" would manifestly increase the likelihood of later disclosure, both to government agencies (as this case makes clear and as the Government largely concedes[34]) and to creditors as well (as the Government implicitly concedes[35]).

The claim that the chilling effect is no different than the prospect of a change in corporate management (Pet. Br. 30-31) ignores the fact that successor management, however resulting, is elected by the *owners* and is guided by company interests, while bankruptcy trustees are guided by the interests of the estate's *creditors* (reviewed *ante,* pp. 22-26), and their decisions are often quite different.

When corporate management decides to divulge attorney-client confidences or to make the attorney available

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[34] Bankruptcy trustees are said to regularly cooperate with government investigations (see Pet., 16; Pet. Br., 32). This case demonstrates not only this phenomenon, but the practice of government authorities hand-picking the trustee (or interim trustee) who is unlikely to refuse a "waiver" request (see p. 7 n6, p. 1 n2, *ante*).

[35] Any "waiver" decisions by trustees must be determined by the interests of the *estate* (Pet. Br., 32 n53). In addition, given trustees' duties to the creditors, and the human proclivity to reflect the interests of those who elect them, creditors' requests for waivers of privilege, like the CFTC's here, would hardly ever be refused. Creditors and would-be claimants would have nothing to lose and in many cases much to gain by obtaining the lawyer's testimony on confidential communications which might (even speculatively) aid them in establishing or enlarging their claims (*e.g.*, in cases of dubious liability, and especially where corporate punitive damages are sought on *respondeat superior* grounds, *see,* Restatement (Second) of Agency, § 217C (1958); *Mattyasovszky v. West Towns Bus Co.*, 61 Ill. 2d 31, 36-37, 330 N.E.2d 509, 512 (1975). Creditors' lawyers would routinely seek waivers to discover privileged communications. Pre-bankruptcy confidences would often, if not always, be subject to disclosure.

as a witness, it does so to obtain a *quid pro quo* for the company. As this case so well demonstrates, the cost-benefit equation is fundamentally altered when a bankruptcy trustee is in control. Thus the fact that it may *sometimes* be in the company interest to waive (Pet. Br., 30 n51) is simply not a basis for assuming that that is the normal case. The Government understandably focuses on the few instances where management is entirely dishonest, and acts against the company interest. That, however, is not a reason to sacrifice attorney-client confidentiality for all corporations (or all people) upon bankruptcy. And that is the necessary impact of a trustee waiver power, since trustees (and prosecutors) will seek attorney-client disclosures whenever they *suspect* insider misconduct or even mismanagement.

A trustee waiver power will especially chill the willingness and ability of honest managers to utilize their counsel to perform in-house investigations. (That was exactly the situation in *Upjohn, supra.*) The investigatory function of legal counsel, who is clothed with the aura of confidentiality like none others in the corporate structure, to obtain disclosure from company staff, will be destroyed by the knowledge that if the company fails to avoid insolvency, management assurances of confidentiality may give way to a trustee's "cooperation" with government investigators.[36]

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[36] Many companies prefer in-house resolution of problems even where prosecution or civil action if feasible, because public disclosure of their failure to prevent the problem can devastate customer (or financers') confidence. The likelihood of post-bankruptcy violation of pre-bankruptcy assurances of secrecy would inhibit if not prevent companies from effecting their own solutions to their own internal problems.

The foreknowledge that a corporation's attorney-client privilege may be waived someday in the interests of its creditors would inhibit pre-bankruptcy disclosures by corporate personnel to corporate counsel.

B. A Trustee Waiver Power Would Discriminate Against Insolvent Clients

The Seventh Circuit found below:

> . . . allowing the trustee in bankruptcy to waive the attorney-client privilege of the corporate debtor discriminates against the corporate debtor solely on the basis of economic status. A solvent corporation, as long as it remains solvent, can freely assert or waive its attorney-client privilege. * * * . . . [I]nvestigating the affairs of the corporate debtor on behalf of the creditors . . . does not justify erosion of the corporation's attorney-client privilege simply on the basis of a change in economic circumstances.
>
> 722 F.2d at 343; Pet. App. 10a

The Government calls this concern "groundless" (Pet. Br. 32). But the underlying purposes of the attorney-client privilege do not concern the financial condition of the client. However justified, economic discrimination is precisely the effect if a trustee, whose authority arises only upon bankruptcy, can waive privilege without the consent of the privileged party, as the trustee in this case has attempted to do, at the Government's request (as trustees usually do (Pet., 16)). The net result is that the attorney becomes an available government witness as to his client's private confidences which, but for bankruptcy, he would not be.

C. Distortion of the Bankruptcy Laws' Purpose and Impact

If the consequences of bankruptcy, voluntary or involuntary, include allowing trustees to "waive" privilege as

to prior confidential communications of their debtors, then a new set of incentives and disincentives for bankruptcy will have been created. If this Court upholds trustee waivers, the prospective disclosure of pre-bankruptcy confidences will become a disincentive for invoking the protections of bankruptcy (for debtors) and an incentive for filing involuntary proceedings (by creditors). Neither result comports with the purposes of the bankruptcy laws.

Injection of such considerations into bankruptcy would skew the application of the bankruptcy laws in a manner not contemplated by Congress. The availability of privileged evidence to creditors—evidence unobtainable outside of bankruptcy—also runs afoul of this Court's concerns in *Butner v. United States,* 440 U.S. 48 (1979).

At least two applications of the proposed trustee waiver power, and concommitant availability of privileged evidence to creditors, implicate *Butner.* First, some creditors and prospective claimants against the debtor could obtain a better position as against the debtor (equity owners or shareholders) than they had before bankruptcy.[37] Second, those who improve their claims over the pre-bankruptcy legal environment reduce the distributions to other outside creditors who are not equally benefitted by the availability of previously privileged evidence.

The Court's refusal in *Butner, supra,* to countenance a different result as between creditors, because of the

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[37] This is especially true where disclosed confidences enable the claimant to establish punitive damages (see, 11 U.S.C. §726 (a)(4)). It would also occur where a claimant obtained evidence through bankruptcy disclosure of privileged information that enabled him to establish what was otherwise an unproveable liability outside of bankruptcy.

happenstance of bankruptcy, focused on state property laws. Yet the same result of differential impact on creditor-creditor recovery would be *created* by the proposed trustee waiver power. This differential, arising from the availability of privileged evidence, would be as dispositive of the result in many cases as refusing to apply state property law in bankruptcy.

The Government's effort to invoke *Butner, supra,* in support of its position (Pet. Br., 23 n40) is based on a presumed bankruptcy *incentive* for debtors to file bankruptcy so that *dishonest* management can retain control of privilege. That argument has no application to honest management, and further ignores the points that (i) corporate directors can be replaced by the stockholders (and officers by directors) after as well as before bankruptcy, and (ii) the stockholders can compel disclosure of privileged communications upon accusations of insider fraud (*Garner v. Walfinbarger,* 430 F.2d 1093 (5th Cir. 1970), *cert. denied,* 401 U.S. 974 (1971)). The Government's position is that creditors should have access in bankruptcy to privileged attorney-client confidences which they may not obtain outside of bankruptcy.

If, as *Butner* suggests, creditors' recovery in bankruptcy should reflect their recovery rights under applicable state law before bankruptcy, then creditors should not gain rights *vis-a-vis* other creditors or over corporate shareholders because of bankruptcy trustee "waivers".

D. The Proposed Trustee Waiver Power Would Apply to Individual Debtors; Selective Application to Avoid this Result Would Be Irrational

As reviewed *ante,* the trustee waiver power urged by the Government necessarily applies to all debtors in bankruptcy, regardless of their form, if it applies at all: the "management" theory as well as the claimed anti-fraud justification admit of no distinctions between debtor status.[38] But the uniform application of this power to individual debtors[39] would plainly be too great a price to pay for the proposed anti-fraud tool, which is no cure in any event.

If this Court were somehow to allow trustee waivers only for corporate bankruptcies while preserving privilege for non-corporate debtors,[40] or even were somehow to limit such waivers solely to corporations, the result would be an irrational distortion of the bankruptcy system.

In either event, identical businesses would be subject to materially different treatment in bankruptcy due to their incorporated or unincorporated status. Closely-held

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38 *See,* Point II(c), pp. 26-30, *ante* (theory); Point III, pp. 35-37, *ante* (justification).

39 Courts that have confronted bankruptcy trustee waivers of individual debtors' privilege have generally allowed such waivers. (*In re Smith, supra; In re Grand Jury Proceedings, supra*). One court that rejected a waiver attempt for an individual, but not for a corporation, did so out of shock at the potential consequences, but offered no cogent legal basis for distinguishing individual debtors. *In re Silvio De Lindegg Ocean Developments of America, Inc.,* 27 B.R. 28 (Bankr. S.D. Fla. 1982).

40 In light of *Bellis v. United States,* 417 U.S. 85 (1974) (partnership has independent institutional identity from individual partners for purposes of the Fifth Amendment privilege) and the cases reviewed in *Bellis,* it seems clear that *if* corporations' privileges pass to the trustee, then partnerships' privileges would also pass. *Cf., In re Boileau,* 736 F.2d 503 (9th Cir. 1984). Presumably trusts, as separate entities, would suffer the same result. *Cf., In re Continental Mortgage Investors,* No. 76-593-S (D.Mass. July 31, 1979) (unpublished) (Massachusetts business trust).

enterprises, family businesses, and sole proprieterships, which are often indistinguishable excepting technical legal status, would either retain or lose their attorney-client privilege to an outside trustee depending on whether they had incorporated. In these circumstances, the result would turn on what is patently a legal fiction. The difference in treatment would bear no rational relation to any real distinction, and certainly not to (i) economic differences or bankruptcy policy, (ii) differences in the attorney-client relationship or the purpose of the privilege, or (iii) the likelihood of insider fraud.

Finally, the creation of a trustee waiver power would create remarkably different treatment amongst different bankruptcy proceedings, as there could be no trustee waiver in those cases where the debtor avoids having a trustee appointed. (*See,* 11 U.S.C. §§ 1104, 1107.) Of course, the Government and the U.S. Trustee would seek a trustee whenever they desire to invade privileged attorney-client confidence of the debtor, which may (or may not) be only those few cases where they suspect insider fraud.

The Government's arguments focus exclusively on corporate bankruptcies involving insider fraud. Because the trustee waiver power urged by the Government cannot be restricted to instances of insider fraud (and would be senseless if it could), it is submitted that the considerations advanced by Respondents strongly outweigh those urged by the Government. In 1982, for example, there were over 77,000 "business" bankruptcies reported. (*See,* U.S. Department of Commerce, Bureau of the Census, *Statistical Abstract of the United States 1984,* p. 536 (104th Ed.)) The possibility of insider fraud in some, and the

chimerical benefits predicted by the Government for those few, cannot outweigh the adverse effect of such a rule on the remainder.

This too would be "too great a wrench . . . to give the bankruptcy system, absent a plain indication from Congress which is lacking here." *Lewis v. Manufacturers National Bank,* 364 U.S. 603, 610 (1961).

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CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

January, 1985

Respectfully submitted,

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No. 84-261

(9)

In the Supreme Court of the United States

OCTOBER TERM, 1984

COMMODITY FUTURES TRADING COMMISSION, PETITIONER

v.

GARY WEINTRAUB, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE COMMODITY FUTURES TRADING COMMISSION

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18pp

TABLE OF AUTHORITIES

Page

Cases:

Page

Cases—Continued:

Statutes and rules:

Page

Statutes and rules—Continued:

Page

Page

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REPLY BRIEF FOR THE COMMODITY FUTURES TRADING COMMISSION

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1. Respondents argue (Resp. Br. 12-17) that the Bankruptcy Code and cases interpreting earlier bankruptcy statutes preclude the trustee's control of a debtor corporation's attorney-client privilege. This argument is plainly without merit. Section 542(e) of the Code (11 U.S.C.) authorizes the court to compel "an attorney, accountant, or other person that holds recorded information * * * relating to the debtor's property or financial affairs" to disclose that information to the trustee, "[s]ubject to any applicable privilege." This provision was designed to limit the ability of attorneys and others to withhold relevant information, not to expand it. See 4 *Collier on Bankruptcy* ¶ 542.06, at 542-21 (L. King 15th ed. 1984); S. Rep. 95-989, 95th Cong., 2d Sess. 84 (1978); H.R. Rep. 95-595, 95th Cong., 1st Sess. 369-370 (1977). Section 542(e) does not by its terms specify

whether the debtor's attorney-client privilege is "applicable" to a trustee's demand for information.[1] Congress quite clearly left this question -- and not, as respondents claim (Resp. Br. 14 n.11), merely the determination of whether particular documents fall within the privilege — to the courts:

> The extent to which the attorney client privilege is valid against the trustee is unclear under current law and is left to be determined by the courts on a case by case basis.

124 Cong. Rec. 32400 (1978) (remarks of Rep. Edwards); *id.* at 33999 (remarks of Sen. DeConcini).[2]

Nor do the hoary cases cited by respondents (Resp. Br. 16-17) support their position.[3] *In re O'Donohoe,* 18 F. Cas. 587 (D. Me. 1869) (No. 10,435), and *In re Krueger,* 14 F. Cas. 870 (D. Mass. 1872) (No. 7,942), addressed the applicability not of the *bankrupt's* attorney-client privilege, but of the privilege of persons who had entered into contracts or

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[1]Allowing the trustee, as management of the corporate debtor, control over the debtor's attorney-client privilege would not, as respondents argue (Resp. Br. 14-15), render the statutory language a nullity. Information that is subject to the debtor's own attorney-client privilege is not denied the trustee, because that privilege is not "applicable" to him. Privileges of parties other than the debtor, such as creditors who have information relating to the debtor, would still be "applicable" as against the trustee. Moreover, under respondents' interpretation, the term "applicable" would be surplusage, for Section 542(e) already gives the trustee free access to nonprivileged recorded information.

[2]Representative Edwards and Senator DeConcini were the floor managers for the Bankruptcy Reform Act of 1978, 11 U.S.C. 101 *et seq.*

[3]Similarly, 5 H. Remington, *A Treatise on the Bankruptcy Law of the United States* § 2003 (15th ed. 1953), relied on by respondents (Resp. Br. 15), does not address the question of who controls a debtor corporation's attorney-client privilege. Nor does the nonassignability of an individual's privilege (see *id.* at 20 n.16) support respondents' argument: there is no question that successor management succeeds to control of a corporation's privilege (Pet. Br. 11).

had other business dealings with the bankrupt. Of course we are not seeking to grant the trustee control over the privilege of any entity other than the corporate debtor. *In re Aspinwall,* 2 F. Cas. 64 (S.D.N.Y. 1874) (No. 591), appears to involve an individual debtor, not a corporation, and thus raises different concerns (see pages 8-9, *infra*). *In re Teuthorn,* 5 Am. Bankr. Rep. 767 (D. Mass. 1901), which also appears to involve an individual debtor, prohibits an attorney who had represented the debtor in the bankruptcy proceeding from later representing the trustee in the same proceeding, a situation inapposite to the facts of the instant case. Before 1978, the only reported authority of which we are aware held that the trustee in bankruptcy does succeed to the debtor corporation's attorney-client privilege. *In re Amjoe, Inc.,* 11 Collier Bankr. Cas. (MB) 45 (Bankr. M.D. Fla. 1976). In any event, whatever the law might have been under the earlier statutes,[4] Congress plainly considered the question an open one with respect to the present Bankruptcy Code.

2. Respondents argue next (Resp. Br. 18-26) that the trustee of a corporation in bankruptcy does not possess the

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[4]Respondents assert (Resp. Br. 16) that "[t]he laws governing bankruptcy examinations have not been materially changed since 1867." But our position rests not merely on the provisions governing examinations, but more fundamentally on the trustee's management powers. In this respect, the law has changed over the past 118 years to grant the trustee greater authority over the affairs of the debtor. See 4 *Collier on Bankruptcy* ¶ 721.02, at 721-2 (L. King 15th ed. 1984).

Respondents' reliance (Resp. Br. 15) on Section 21(a) of the Bankruptcy Act of 1898, ch. 541, 30 Stat. 552, which permitted the trustee to override assertions of the spousal privilege, is misplaced. Consistent with its preference for judicial resolution of privilege issues, Congress did not carry forward the statutory limitation on the spousal privilege in the new Bankruptcy Code. See S. Rep. 95-989, *supra,* at 43; H.R. Rep. 95-595, *supra,* at 332; Bankr. R. 2004 advisory committee note, 9017. Moreover, provisions relating to personal privileges are irrelevant to whether the trustee has authority over a debtor corporation's attorney-client privilege.

management powers and duties necessary to be accorded control of the corporation's attorney-client privilege. Respondents do not dispute that control of a corporation's attorney-client privilege rests with its present management (see Pet. Br. 9-12). Nor do they take direct issue (except to say, erroneously, that our formulation assumes the result, Resp. Br. 21 n.18) with the necessary corollary that the question in this case is who, under the Bankruptcy Code, manages a debtor corporation (see Pet. Br. 22). When the powers and responsibilities of the trustee and of the officers and directors of a corporation in bankruptcy are compared, the conclusion is inescapable that it is the trustee who now constitutes management and who must therefore have control over the attorney-client privilege.[5]

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[5]Our "management" argument does not, as respondents suggest (Resp. Br. 21 n.17), "collapse[]" into the alternative argument that control over the privilege constitutes intangible property encompassed within the bankruptcy estate (see Pet. Br. 22 n.38). We do not contend that the trustee controls the privilege simply by virtue of his position as representative of the estate (see 11 U.S.C. 323(a)), but rather because of the full complex of rights and responsibilities that fall to the trustee under the Code (see Pet. Br. 12-24), and because the debtor's officers and directors no longer play a role in managing the corporation (see *id.* at 18, 25). Had Congress intended its enumeration in Section 541 of property included in the estate to limit the trustee's authority over the debtor's privileges, it would have said so. Cf. *Ohio* v. *Kovaks,* No. 83-1020 (Jan. 9, 1985), slip op. 5 & n.4. It would make little sense to suppose that the same Congress that explicitly left the privilege question to the courts (see page 2, *supra*) would elsewhere have, as respondents contend, conclusively rejected the trustee's ability to control the privilege.

Respondents also are wrong in claiming support for their position (Resp. Br. 43-44) in *Butner* v. *United States,* 440 U.S. 48 (1979). The Court's reliance in *Butner* on state nonbankruptcy law suggests precisely the approach we have taken here: control over a bankrupt's attorney-client privilege should rest with the party in a position most closely analogous to corporate management, which controls the privilege outside of bankruptcy. Respondents' contention that control by the trustee would skew incentives toward bankruptcy improperly assumes

a. The trustee's extensive management powers are described in our opening brief (at 12-21, 25 n.42). In summary, the trustee in a commodity broker liquidation always operates the debtor's business;[6] a liquidation trustee succeeds to the corporation's causes of action; he must investigate the debtor's financial affairs, including the conduct of former management; and he may enter into transactions concerning property of the estate. By contrast, the officers and directors of the debtor no longer play a part in managing the corporation's affairs. Whatever limited nonmanagerial role, if any, may be left for former management after a trustee has been appointed,[7] it plainly is no longer in control of the business.

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that creditors would be able to obtain privileged information and use it for their own benefit, thereby reducing the value of the estate (see Resp. Br. 43). Our position is not, as respondents contend (*id.* at 44), that "creditors should have access in bankruptcy to privileged attorney-client confidences," but rather that the trustee should have control over the privilege and be able to allow third parties access to privileged information when it is in the best interests of the estate as a whole (see 11 U.S.C. 323(a), 704). Hence, the trustee's fiduciary responsibility to maximize the value of the estate would preclude the manipulation by creditors that respondents envision. Moreover, the mere filing of a petition does not ensure that an order for relief will be entered (see 11 U.S.C. 303(h)), and the Code already provides sufficient deterrents, such as punitive damages, against creditors who might be tempted to file an involuntary petition in bad faith (see 11 U.S.C. 303(i)(2)).

[6]Trustees in other liquidations may operate the debtor's business with approval of the court. Respondents' suggestion (Resp. Br. 25 n.21) that the Code's special provisions for bankrupt commodity brokers give less management authority to trustees than that possessed by officers and directors outside of bankruptcy is incorrect. The provisions of the Code were designed to ensure that the trustee would be limited by the same constraints imposed on the management of commodity brokers outside bankruptcy. See Pet. Br. 21 n.36.

[7]Shareholders, like creditors, may be represented by official or unofficial committees (and of course, in all cases, ultimately by the trustee himself). See 11 U.S.C. 323, 705, 1102, 1103. In reorganization, officers of a corporate debtor not in possession may have standing to be heard on behalf of shareholders on certain questions that may affect their

b. The trustee's responsibilities also are similar to those of management outside bankruptcy (see Pet. Br. 16-17). Contrary to respondents' contention (Resp. Br. 22 n.20), management of a corporation not in bankruptcy does owe fiduciary duties to the corporation's creditors. See *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6, 12 (1971); *Pepper* v. *Litton*, 308 U.S. 295, 306-307 (1939) (corporate director's "fiduciary obligation * * * [is] 'designed for the protection of the entire community of interests in the corporation — creditors as well as stockholders' ") (citation omitted); see also *McCandless* v. *Furlaud*, 296 U.S. 140, 156-157 (1935); *Southern Pac.* v. *Bogert*, 250 U.S. 483, 492 (1919); *Jackson* v. *Ludeiing*, 88 U.S. (21 Wall.) 616, 624-625 (1874). These duties require management to pay creditors before shareholders, to refrain from engaging in fraudulent conveyances, and to administer an insolvent corporation's assets primarily for the benefit of its creditors. See *McDonald* v. *Williams*, 174 U.S. 397, 404 (1899); *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U.S. 371, 383 (1893); *Wood* v. *Dummer*, 30 F. Cas. 435 (C.C.D. Me. 1824) (No. 17,944) (Story, J.); *Singer* v. *Hutchinson*, 183 Ill. 606, 619, 56 N.E. 388, 392-393 (1900); 15A W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 7369 (rev. ed. 1981); Clark, *The Duties of the Corporate Debtor to Its Creditors*, 90 Harv. L. Rev. 505

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particular interests in a case (see Resp. Br. 19 n.15). But this right to be heard must not be confused with the right to exercise managerial control over the corporation, which passes exclusively to the trustee. Cf. *Zeleznik* v. *Grand Riviera Theater Co.*, 128 F.2d 533, 536 (6th Cir. 1942) (shareholders' derivative action may not be brought without prior demand on bankruptcy trustee). It is the trustee who, by virtue of his management of the debtor, requires control over the privilege and who, by virtue of his fiduciary responsibilities, can be expected to exercise that control in the best interests of all concerned. Conversely, former management, whose own communications are normally at issue, neither requires control over the privilege nor is in any position to represent the best interests of either the shareholders or the creditors.

(1977).[8] The fiduciary responsibilities of corporate management to creditors have to a large extent been codified in most states' corporation laws. See, *e.g.*, Model Business Corp. Act §§ 45, 98 (1981); Ill. Ann. Stat. ch. 32, §§ 9.10(c), 12.05(c) (Smith-Hurd Supp. 1984); N.Y. Bus. Corp. Law §§ 510, 1005, 1210 (McKinney 1963 & Supp. 1984-1985); see also *In re MortgageAmerica Corp.*, 714 F.2d 1266, 1269-1271 (5th Cir. 1983); 15A W. Fletcher, *supra*, § 7385.[9]

Respondents also make much of the fact that shareholders possess only a residual claim to a bankrupt estate, recovering only after all creditors are paid in full (Resp. Br.

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[8]In view of the duties owed to creditors by an insolvent corporation (whether or not it is in bankruptcy), the creditors' interest in the corporation is best understood, for present purposes, as an ownership interest. See generally *McDonald* v. *Williams*, *supra*; Baird & Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 U. Chi. L. Rev. 97, 112-113 & n.52 (1984); Note, *Creditors' Derivative Suits on Behalf of Solvent Corporations*, 88 Yale L.J. 1299, 1304-1305 (1979). In commodity broker bankruptcies in particular, most claims are brought by customers, who own the funds they have placed with the broker (see Pet. Br. 20 n.32). Accordingly, the trustee acts on behalf of all the ownership interests in the corporate debtor, just as does management outside bankruptcy.

[9]We explained in our opening brief (at 20-21 & nn.32, 36, 37) that officers of commodity brokers owe fiduciary duties to their customers, who constitute most of a commodity firm's creditors. An administrative law judge has recently issued an initial decision concluding that Gary Weintraub, the attorney whose assertion of the privilege is at issue in this case, did not violate the antifraud provisions of the Commodity Exchange Act, 7 U.S.C. 6b(A), because he did not have actual or constructive knowledge of Frank McGhee's illegal activities and did not, as corporate counsel, owe a duty to the firm's customers to discover those activities. *In re Weintraub*, CFTC No. 83-1 (Jan. 7, 1985) (a copy of this decision has been lodged with the Clerk). In dicta, the administrative law judge limited the personal liability of an officer of a commodity broker to cases where he has knowledge of the fraud in question (slip op. 17-18). This decision, which has been appealed to the full Commodity Futures Trading Commission, does not affect the instant case.

22). But exactly the same is true of an insolvent corporation not in bankruptcy. See, *e.g., Sanger* v. *Upton,* 91 U.S. 56, 60 (1875); *Citizens' National Bank* v. *Greene,* 258 Ky. 373, 80 S.W.2d 6, 7 (1935); *American State Bank* v. *Jones,* 184 Minn. 498, 239 N.W. 144, 146 (1931); 15A W. Fletcher, *supra,* § 7417, at 137 ("Stockholders of an insolvent corporation cannot participate in the distribution of its assets until the claims of creditors are paid. * * * [T]he only interest a stockholder has * * * is his interest in any surplus over and above what is required to pay its depositors and creditors."). [10] The interest of shareholders in liquidation is thus identical to that of shareholders of insolvent corporations outside of bankruptcy — they desire to maximize the value of the estate. When the trustee determines that waiver of the debtor's privilege may increase the assets of the estate, he is acting consistently with the best interests of the debtor's shareholders as well as its creditors. [11] In making this judgment the trustee is bound by the strictest of fiduciary duties. See *Mosser* v. *Darrow,* 341 U.S. 267, 271 (1951); see also *Bayliss* v. *Rood,* 424 F.2d 142, 146 (4th Cir. 1970).

3. Respondents claim (Resp. Br. 7, 26-30, 44-46) that our position would compel the result that trustees could waive the privilege of individual debtors as well as that of corporate bankrupts. This question simply is not presented and need not be decided by the Court. See generally *Upjohn Co.* v. *United States,* 449 U.S. 383, 396-397 (1981). [12] In any event, there is a significant difference between individuals

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[10] See also Baird & Jackson, *supra,* 51 U. Chi. L. Rev. at 105 nn.28-29, 112-113 & n.52.

[11] Similarly, in reorganization, the trustee's obligations are no different from those of the officers and directors when the debtor is permitted to remain in possession. See 11 U.S.C. 1107; *Wolf* v. *Weinstein,* 372 U.S. 633, 649-650 (1963); S. Rep. 95-989, *supra,* at 116.

[12] The debtor here was incorporated, as are approximately 90% of all commodity brokers.

and corporations with respect to the attorney-client privilege. An individual's privilege is personal to him. [13] Unlike a corporation, there is no "management" that controls an individual's privilege. Accordingly, the fact that a trustee may in some circumstances oversee the affairs of an individual debtor (but see 11 U.S.C. 1304(b)) does not necessarily mean that he should obtain control over the privilege. This distinction is neither irrational nor in conflict with the Bankruptcy Code [14] — it follows naturally from the differences under nonbankruptcy law between corporations and individuals. Cf. *United States* v. *White,* 322 U.S. 694, 699-700 (1944); see generally *In re Silvio De Lindegg Ocean Developments of America, Inc.,* 27 Bankr. 28 (Bankr. S.D. Fla. 1982).

4. Finally, respondents argue (Resp. Br. 30-42) that vesting control over the privilege in the trustee will not serve any beneficial policy but rather will only chill attorney-client

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[13] This is true even where the individual operates a sole proprietorship. A sole proprietorship is not an artificial entity; it "has no legal existence apart from its owner." *In re Grand Jury Empanelled February 14, 1978,* 597 F.2d 851, 859 (3d Cir. 1979).

[14] Respondents are incorrect in arguing (Resp. Br. 28-29) that the Bankruptcy Code does not differentiate in relevant respects between individual and corporate debtors. Unlike an individual, a corporation has no function distinct from its business existence, and thus for practical purposes a corporation in bankruptcy merges entirely into the estate, which encompasses all corporate assets and earnings and is controlled by the trustee (see Pet. Br. 13-14). In contrast, certain assets and post-petition earnings of an individual debtor are not part of the estate and hence not subject to the trustee's control (see 11 U.S.C. 522, 541(a)(6)). Moreover, individuals may not be discharged from certain debts, such as those connected with their frauds (see 11 U.S.C. 523, 727), while a corporation in reorganization obtains a complete discharge of such potential liability upon confirmation of a plan (see 11 U.S.C. 1141(d)); a corporation undergoing liquidation may not be discharged (see 11 U.S.C. 727(a)(1)), but becomes an empty shell without future viability (see *Ohio* v. *Kovaks,* slip op. 2 (O'Connor, J., concurring)).

communications.[15] Respondents' solution, to allow former management to block effective inquiry into its own wrongdoing, makes little sense indeed. Such a rule would serve only the personal interests of former management; it would in no way further the interests of the estate's beneficiaries. The trustee is a court-supervised fiduciary charged with maximizing the value of the estate (11 U.S.C. 323, 704(1)). He is surely in the best position to make decisions that will be fair to all of the interested parties — creditors and equityholders — as a group.[16] Regardless of who has appointed him, the trustee must act in the best interests of the estate as a whole. Waivers contrary to the interests of the estate may be challenged in bankruptcy court.[17] And, as we explained earlier (Pet. Br. 10-11, 30), the potential chilling effect here is identical to that which exists outside bankruptcy: an individual always runs the risk that present or successor management may waive the privilege with respect to his own communications to the corporation's attorney. In view of the trustee's fiduciary responsibilities, there is no

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[15]Respondents erroneously equate the trustee's power over the privilege with its abrogation. But the trustee's control over the privilege no more guarantees that it will be waived than does management's identical authority outside of bankruptcy. The question here, unlike in *Upjohn Co.* v. *United States, supra,* is not the existence or the scope of the privilege, but simply which natural person should be authorized to control it for the entity.

[16]See generally Baird & Jackson, *supra.*

[17]Respondents challenged below only the trustee's power to waive the debtor's privilege, not whether the waiver here was in the best interests of the estate. Moreover, their belated challenge is addressed to the wrong forum: challenges to the conduct of bankruptcy trustees should be raised in the bankruptcy court, not in a subpoena enforcement court (see Pet. Br. 36 n.63). In any event, contrary to respondents' speculations (Resp. Br. 2-3 & n.3), the trustee, by virtue of his own investigation and the adversary actions he had commenced against insiders, was in a position to make an informed judgment at the time he executed the waiver (see Pet. Br. 4-5 n.8).

reason to carve out a special rule for bankruptcy, and indeed every reason not to do so.[18]

For the foregoing reasons and those presented in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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[18]Respondents' speculation (Resp. Br. 32-35) that the trustee has no need of privileged information is unfounded. The debtor's attorney is often the only practical source of information to which the trustee must have access if he is to carry out his management functions. Denying such information to the trustee would only increase the expenses charged against the estate and decrease the assets included within it. See Brief of John K. Notz, Jr. at 4.